

5624
No.....

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOHN VERNON QUARLES and HOPE VIR-
GINIA FINN,

Appellants,

VS.

THE CITIZENS NATIONAL BANK OF
SALMON, IDAHO, a corporation,

Appellee.

Transcript of the Record

*Upon Appeal from the United States District Court
for the District of Idaho, Eastern Division*

FILED

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PAUL P. O'BRIEN,
CLERK

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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Boise, Idaho

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*In the District Court of the United States for the
District of Idaho, Eastern Division*

JOHN VERNON QUARLES and HOPE VIR-
GINIA FINN,

Plaintiffs,

vs.

THE CITIZENS NATIONAL BANK OF
SALMON, IDAHO, a corporation,

Defendant.

No. 628

In Equity

COMPLAINT AS AMENDED

To the Honorable, the Judge of the District Court
of the United States, for the District of Idaho,
Eastern Division:

John Vernon Quarles and Hope Virginia Finn,
citizens of the State of California, residing at Lan-
kershim, Los Angeles County, in said State, bring
this their bill of complaint against The Citizens Na-
tional Bank of Salmon, Idaho, a corporation or-
ganized under the National Bank Act of the United
States and engaged in the business of banking in
Salmon, Lemhi County, Idaho, and respectfully
show unto this Honorable Court:

I.

That the plaintiffs John Vernon Quarles and
Hope Virginia Finn (formerly Hope Virginia

Quarles) are citizens and residents of the State of California, residing in Los Angeles County, said State, and that the said John Vernon Quarles is now over the age of twenty-one years and the said Hope Virginia Finn, whose maiden name was Hope Virginia Quarles, is now over the age of eighteen years.

II.

That the defendant The Citizens National Bank of Salmon, Idaho, now is and during all the times hereinafter mentioned was a corporation organized under the National Bank Act of the United States, with its principal place of business at Salmon, Lemhi County, Idaho.

III.

That this is a suit of a civil nature, in equity, and is wholly between citizens of different States, and that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00.

IV.

That on and for some time prior to the 31st day of May, 1922, one G. B. Quarles was indebted to the plaintiffs herein, who were then minors under the ages of 21 and 18 years, respectively, in an amount of about \$4,490.88; that for the purpose of protecting the said plaintiffs in their property rights, the District Court of the Sixth Judicial District of the State of Idaho, in and for Lemhi

County, on or about the 31st day of May, 1922, and for the purpose of prosecuting an action in favor of the said plaintiffs and against the said G. B. Quarles, appointed one H. L. McCaleb, as the guardian ad litem for said plaintiffs in said action and proceeding; that such proceedings were had in such action so prosecuted on behalf of said plaintiffs by the said H. L. McCaleb in the District Court of the Sixth Judicial District of the State of Idaho, in and for Lemhi County, against the said G. B. Quarles, that judgment was thereupon duly entered by said Court in favor of the said plaintiffs and their said guardian ad litem and against the said G. B. Quarles for the sum of \$4,490.88.

V.

That thereafter and on or about the 1st day of June, 1922, the said G. B. Quarles, being unable to pay and discharge said judgment, but desiring to avoid execution being taken out thereon at said time and desiring also to secure the payment thereof, made, executed and delivered to the said H. L. McCaleb as guardian ad litem for the said plaintiffs and for the benefit and protection of said plaintiffs, a certain mortgage covering, among other things, that certain building known as the "Wool Warehouse" and located on the right of way of the Gilmore and Pittsburgh Railroad Company south of the track of said Company, and westerly from the Depot of said Company in Salmon, Idaho,

and about ten hundred feet distant from said depot, said wool warehouse being a frame structure, sides and roof of iron and on a concrete foundation, a copy of said mortgage, marked Exhibit "A", is hereto attached and hereby referred to for a full, true and correct statement of the terms and conditions thereof, and plaintiffs pray that the same may be taken and considered with the same force and effect as if the same were here set out at large. That said mortgage was duly acknowledged and sworn to as required by the laws of the State of Idaho governing mortgages on personal property and the same was filed for record in the office of the County Recorder of said Lemhi County on the 1st day of June, 1922, at 20 minutes past 3 o'clock P. M. and a memorandum or record thereof was made in Book E of Chattel Mortgages at page 83 of the records of said office, as required by the laws of the State of Idaho.

VI.

That thereafter and about the month of September, 1922, the said H. L. McCaleb, acting in the interest of the plaintiffs, but without their knowledge or consent, foreclosed the said mortgage under Sections 6380, 6381, 6382, 6383 and 6384 of the Compiled Statutes of Idaho; that in connection with such foreclosure, the sheriff obtained peaceable possession of said wool warehouse and after giving notice of sale as required by the Statutes above re-

ferred to, the Sheriff of said Lemhi County, Idaho, sold said wool warehouse on or about September 30, 1922, at public sale to these plaintiffs, who were represented in said matter by Rose Loring Quarles, for the sum of \$25.00, and delivered to her a bill of sale therefor as required by Section 6383 of the Compiled Statutes of Idaho, and made his return of sale as required by Section 6384 of said Statutes, and thereupon the said Rose Loring Quarles on behalf of these plaintiffs took possession of said wool warehouse; that said Rose Loring Quarles bid said property in and purchased the same in the interest of and for the use and benefit of these plaintiffs and for the purpose of protecting the property rights of these plaintiffs, who then and for a long time thereafter were minors as aforesaid under the ages of 21 years and 18 years respectively; that the said Rose Loring Quarles, prior to the commencement of this suit, has duly assigned, transferred and set over to the plaintiffs herein all right, title and interest acquired by her under the said sale in and to said wool warehouse and all rights to an accounting from the said defendant for the use and occupation of said wool warehouse and for the reasonable rental value thereof; that the plaintiffs herein have acquired and now hold all right, title and interest to said wool warehouse acquired by said Rose Loring Quarles and all right to receive and demand from the said defendant a full and complete accounting for the use and occupation of said wool

warehouse by the said defendant as hereinafter alleged and all right to demand and receive from said defendant all rentals, dues and damages of whatsoever kind due and owing from the said defendant to said Rose Loring Quarles, and the said G. B. Quarles has likewise transferred and assigned to these plaintiffs, prior to the commencement of this suit, whatever claim or demand he might have against the said defendant on account of the wrongful taking possession of said wool warehouse and withholding the possession thereof as hereinafter alleged from these plaintiffs and from the said Rose Loring Quarles, as well as from the said G. B. Quarles.

VII.

That on or about the 15th day of April, 1922, the said defendant The Citizens National Bank of Salmon commenced an action against the said G. B. Quarles in the District Court of the Sixth Judicial District of the State of Idaho, in and for Lemhi County, and on or about the 17th day of April, 1922, the Sheriff of said Lemhi County pretended to levy a writ of attachment which had been issued in said cause, on the said wool warehouse, said wool warehouse being personal property situated on the railroad right of way, and the said Sheriff pretended to appoint a custodian to take possession of said property, but neither the said Sheriff nor the said custodian at any time took possession or con-

trol of said wool warehouse, but the said wool warehouse at the time of said pretended attachment was and for upwards of five months thereafter continued to be and remain in the possession of the said G. B. Quarles, who used the same in his business and collected all the rents and income therefrom and applied the same to his own use, and at no time did the Sheriff, or his deputy or custodian, in said action or under said writ of attachment, take possession or control of said wool warehouse; that said attachment was, under the laws of the State of Idaho, wholly void and ineffectual and no lien, right or interest whatsoever was acquired on or in said wool warehouse by said Citizens National Bank of Salmon by or under said pretended attachment.

VIII.

That thereafter and on or about the 2nd day of October, 1922, the said District Court entered judgment in said action in favor of the said Citizens National Bank of Salmon and against the said G. B. Quarles for an amount of upwards of \$5,000.00.

IX.

That thereafter and on or about the 16th day of October, 1922, the said G. B. Quarles was, by the District Court of the United States, for the District of Idaho, Eastern Division, adjudged and declared a bankrupt; that thereafter one Allen C. Merritt,

of Salmon, Idaho, was duly elected and appointed Trustee in bankruptcy and such bankruptcy proceedings were thereafter concluded and such proceedings had therein that on or about the 28th day of February, 1924, the said G. B. Quarles received his discharge in bankruptcy.

X.

That the judgment hereinbefore referred to so obtained by the defendant The Citizens National Bank of Salmon against the said G. B. Quarles was duly listed by the said G. B. Quarles in said bankruptcy proceedings in his schedule of liabilities, but the said wool warehouse having been sold as aforesaid prior to said bankruptcy proceedings, was not listed as part of the assets of said G. B. Quarles and no claim to said wool warehouse was made by the said Trustee in bankruptcy.

XI.

That on or about the 15th day of January, 1923, the said defendant, The Citizens National Bank of Salmon, caused a writ of execution to be issued under its said judgment against said G. B. Quarles and placed the same in the hands of the Sheriff of said Lemhi County and caused the said Sheriff to pretend to levy said writ of execution on said wool warehouse, notwithstanding said G. B. Quarles had been adjudged a bankrupt long prior to the issuance of said writ of execution and notwithstanding said wool warehouse had been sold on or about Septem-

ber 30, 1922, a as aforesaid to these plaintiffs; that said defendant caused said wool warehouse to be sold under its writ of execution issued as aforesaid, and the Sheriff of said Lemhi County pretended to sell said wool warehouse on or about the 12th day of February, 1923, to the said defendant Citizens National Bank under said writ of execution, for the sum of \$25.00; that said sale or pretended sale was, as these plaintiffs are informed and believe and so allege the fact to be, absolutely void and ineffectual and did not vest in or transfer to the said defendant any right, title or interest whatsoever in or to said wool warehouse, or any part thereof, but notwithstanding said void and ineffectual sale, the said defendant wrongfully and without right, took possession of said wool warehouse on or about the 12th day of February, 1923, and ever since said date has wrongfully and without right held the possession thereof and deprived these plaintiffs and the said Rose Loring Quarles of the possession, use and enjoyment thereof and of the rentals and income therefrom.

XII.

That the said defendant, as plaintiffs are informed and believe and so allege the fact to be, has annually collected large sums, to-wit: Upwards of \$1,000.00 per year, for storage, rentals and other uses of said wool warehouse, and has applied such moneys so collected to its own use and benefit, all

of which was most prejudicial to the rights of these plaintiffs, who were minors as aforesaid.

XIII.

That the reasonable rental value of the said wool warehouse was, during the years 1923, 1924 and 1925, and is during the year 1926, the sum of \$1,000.00 per year; that the said defendant has, as aforesaid, wrongfully and without right held possession of said wool warehouse and applied to its own use and benefit the earnings, rents, income and profits thereof, to which the said plaintiffs were entitled, and said defendant has deprived these plaintiffs of the possession, use and enjoyment of said wool warehouse ever since on or about the 12th day of February, 1923.

XIV.

That plaintiffs are without adequate remedy in the premises and only in a suit of this nature can the questions herein involved be adequately determined and justice done these plaintiffs.

XV.

For a second cause of action, plaintiffs allege and show:

(a) They adopt and make a part of this cause of action as fully and with the same force and effect as if here set out in full, paragraphs numbered I, II, III, IV, V, VII, VIII, all that part of paragraph

XI to and including the figures "\$25.00" and XIV of the first cause of action.

(b) That plaintiffs are now the owners of the said mortgage (Exhibit "A") from G. B. Quarles to the said H. L. McCaleb, dated June 1, 1922; that the indebtedness secured by said mortgage has not, nor has any part thereof, been paid to these plaintiffs or to anyone for them; that said mortgage is a first and prior lien upon the said wool warehouse; that the indebtedness secured thereby is long past due and there is now due and owing to these plaintiffs the principal amount set out in said mortgage, to-wit: The sum of \$4,490.88 and interest thereon at the rate of seven per cent. per annum from June 1, 1922, and these plaintiffs have elected and hereby do elect to foreclose said mortgage against the said wool warehouse.

IN CONSIDERATION WHEREOF, plaintiffs pray this Honorable Court as follows:

1. That it may be adjudged and decreed that the attachment or pretended attachment of said premises by the defendant, The Citizens National Bank, about the month of April, 1922, was void and ineffectual and did not create any lien whatsoever on or against the said wool warehouse.

2. That it may be adjudged and decreed that the mortgage from the said G. B. Quarles to the said H. L. McCaleb as guardian ad litem of these

plaintiffs and dated on or about the 1st day of June, 1922, was a first and prior lien on and against said wool warehouse and that the sale of said premises on the foreclosure of said mortgage, on or about the 30th day of September, 1922, vested in and transferred to the said Rose Loring Quarles a good and valid title to said wool warehouse.

3. That it may be adjudged and decreed that the pretended sale of said wool warehouse on or about the 12th day of February, 1923, to the defendant The Citizens National Bank of Salmon under its writ of execution was void and ineffectual and transferred no right, title or interest whatsoever to the said The Citizens National Bank in said wool warehouse.

4. That it may be adjudged and decreed that the possession of said defendant, The Citizens National Bank of Salmon, of said wool warehouse since the 12th day of February, 1923, has been wrongful and without right and that the said defendant has wrongfully and without right deprived the said plaintiffs and the said Rose Loring Quarles of the use and enjoyment of said premises during all of said period, to-wit: From the 12th day of February, 1923.

5. That an accounting may be had of the rents, income and profits of said wool warehouse which the said defendant has applied to its own use and benefit and that said defendant be required to ac-

count to the plaintiffs herein for all of said rents, income and profits and for the reasonable rental value of said wool warehouse.

6. That the said plaintiffs may be adjudged and decreed to be the owners of said wool warehouse and of the whole thereof, and that the defendant be ordered and directed to deliver the possession thereof to the said plaintiffs.

7. That the plaintiffs may have judgment against the said defendant for the amount found due upon the said accounting and for the reasonable rental value of said wool warehouse, to-wit: at the rate of \$1,000.00 per year from the 12th day of February, 1923, to date of judgment herein.

8. That in the event the Court should for any reason find that the said mortgage has not been legally foreclosed, that plaintiffs may then have a decree for the foreclosure of said mortgage and sale of said premises.

9. That plaintiffs may recover their costs herein and have such other relief as may be just and equitable.

RICHARDS & HAGA

OLIVER O. HAGA

Solicitors for Plaintiffs

Residence: Boise, Idaho

(Duly Verified)

EXHIBIT "A"

THIS MORTGAGE, Made this 1st day of June, 1922, by G. B. Quarles of Salmon, County of Lemhi, State of Idaho, the mortgagor, to H. L. McCaleb of Dillon, County of Beaverhead, State of Montana, the mortgagee,

WITNESSETH: That the said mortgagor hereby mortgages to said Mortgagee all of those certain goods and chattels now being in Lemhi County, State of Idaho, and described as follows:

That certain building known as the Wool Warehouse located on the right of way of the Gilmore and Pittsburgh Railroad Company, South of the track of said Company, and West-erly from the depot of said Company in Salmon, Idaho, about feen hundred feet distant from said depot. Said wool warehouse being of frame structure, sides and roof of iron and concrete foundation, also one seven passenger, six cylinder Studebaker touring automobile Serial number 6 15-688.

to secure the payment of Forty-four hundred ninety and 88/100 Dollars, according to the terms and conditions of a judgment against the mortgagor in favor of the mortgagee as guardian ad litem of John V. Quarles and Hope Virginia Quarles, rendered in the District Court of the Sixth Judicial District of the State of Idaho in and for the County of Lemhi,

May 31st, 1922. This mortgage is given and accepted as additional security to any security which may exist in favor of the mortgagee by way of said judgment being a lien upon any real property of the said mortgagor and this mortgage does not in any way waive any such other lien upon any real property which said judgment may be a lien nor does this mortgage waive the right of the judgment creditor of the said G. B. Quarles to share in the proceeds of the sale of any attached property, attached in the suit of the Citizens National Bank against the said G. B. Quarles.

It is also agreed that if the mortgagor shall fail to make any payment as in said judgment provided, then at the option of said mortgagee, his executors, administrators, or assigns, the said judgment shall immediately become due and payable and said mortgagee may take possession of said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds to pay the whole amount in said note specified and all costs of any action or sale including three hundred dollars, as counsel fees, paying the surplus to the said mortgagor.

IN WITNESS WHEREOF, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

Signed, Sealed and Delivered

in the Presence of G. B. QUARLES (Seal)

State of Idaho)
)ss.
 County of Lemhi)

G. B. Quarles the mortgagor in the foregoing mortgage named deposes and says that the foregoing mortgage is made in good faith and without any design to hinder, delay or defraud creditor or creditors.

G. B. QUARLES

Subscribed and sworn to
 before me this 1st day of
 June, 1922.

Allen C. Merritt

(SEAL)

STATE OF IDAHO)
)ss.
 COUNTY OF LEMHI)

On this first day of June in the year 1922, before me, Allen C. Merritt, a Notary Public in and for said State, personally appeared G. B. Quarles, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Allen C. Merritt

Notary Public Residing at
Salmon, Idaho

(SEAL)

Instrument No. 26428

State of Idaho)
)ss.
County of Lemhi)

I hereby certify that this instrument was filed for record at the request of H. L. McCaleb at 20 minutes past 3 o'clock P. M., this 1st day of June, A. D. 1922, in my office and duly recorded in Book E of Chattel Mortgages at page 83.

W. W. Simmonds, Ex-officio
Recorder by Delia M. Glennon,
Deputy

Fees \$.50 paid.

Endorsed: Filed July 7, 1926.

W. D. McREYNOLDS, Clerk.

By M. FRANKLIN, Deputy.

(Title of Court and Cause)

ANSWER

Comes now the defendant, above named, and in answer to the Bill of Complaint on file in the above entitled action, admits, denies and alleges as follows:

I.

Admits Paragraphs I, II, and III.

II.

Answering Paragraph IV, this defendant is without information, knowledge or belief sufficient to enable it to answer whether said G. B. Quarles on and for some time prior to the 31st day of May, 1922, or at all, was indebted to the plaintiffs herein in the sum of about \$4,490.88, or any amount whatsoever, and basing its answer on that ground denies the same.

Further answering said paragraph, this defendant admits that one H. L. McCaleb was on or about the 31st day of May, 1922, appointed guardian ad litem for said plaintiffs by the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Lemhi, for the purpose of prosecuting an action in favor of the plaintiffs herein against said G. B. Quarles, and admits that such proceedings were had in said action in said Court, and that judgment was entered by said Court in favor of the plaintiffs and guardian ad litem, and against G. B. Quarles in the sum of \$4,490.88, but

this defendant is without knowledge, information or belief as to whether said action was instituted for the purpose of protecting the said plaintiffs in their property rights, and upon that ground denies the same, but alleges on information and belief that said guardian was appointed and said action prosecuted and said judgment obtained for the purpose of hindering, delaying and defrauding the creditors of said G. B. Quarles.

III.

Answering Paragraph V, this defendant denies that the said G. B. Quarles made, executed and/or delivered to H. L. McCaleb, as guardian ad litem, the mortgage mentioned and set forth in said paragraph, but admits that on or about June 1, 1922, said G. B. Quarles made, executed and delivered to H. L. McCaleb, in his individual capacity, a mortgage whereby he pretended to mortgage the property mentioned and described in Paragraph V of said Bill of Complaint, and that the same was filed for record in the Office of the County Recorder of Lemhi County, as alleged in said paragraph.

Admits that G. B. Quarles was unable to pay and discharge said judgment, but defendant is without absolute knowledge as to whether the said mortgage was executed to avoid execution being taken out thereon and to secure the payment of said judgment and for the protection of plaintiffs, but defendant is informed and believes and on that ground alleges that the said mortgage so given to

H. L. McCaleb in his individual capacity, as aforesaid, was made and given for the purpose of hindering, delaying and defrauding the creditors of the said G. B. Quarles, and denies each and every other allegation in said paragraph not otherwise admitted or qualified.

IV.

Answering Paragraph VI, this defendant admits that in the month of September, 1922, the said H. L. McCaleb attempted to foreclose said mortgage so given to him in his individual capacity, but denies that he foreclosed said mortgage in compliance with or under Sections 6380, 6381, 6382, 6383 and 6384, of the Compiled Statutes of Idaho; and further denies that in connection with such foreclosure the Sheriff obtained peaceable possession of said wool warehouse under said foreclosure proceedings, or that he gave notice of the sale thereof as required by the Statutes above referred to; this defendant has no knowledge, information or belief sufficient to answer whether in such alleged foreclosure H. L. McCaleb was acting in the interests of the plaintiffs and without their knowledge and consent, and upon that ground denies the same.

Further answering said paragraph, this defendant says it has no knowledge or belief sufficient to enable it to answer whether the Sheriff of Lemhi County sold said wool warehouse or attempted to sell the same on or about September 30, 1922, as in

said Bill of Complaint alleged, at public sale to Rose Loring Quarles, for the sum of \$25.00, or any sum, or delivered or attempted to deliver her a Bill of Sale therefor as required by Section 6383 of the Compiled Statutes of Idaho, and placing its denial on that ground denies the same; and denies that the said Sheriff made his return of said alleged sale as required by Section 6384 of said Statutes, and denies that thereupon, or at all, the said Rose Loring Quarles took possession of said wool warehouse, and denies that said Rose Loring Quarles bid said property in and purchased the same in the interest of and for the use and benefit of these plaintiffs and/or for the purpose of protecting the property rights of these plaintiffs.

Further answering said paragraph, this defendant says it has no knowledge, information or belief sufficient to answer whether prior to the commencement of this suit, said Rose Loring Quarles has duly or at all assigned, transferred and set over to the plaintiffs all right, title and interest acquired by her under said alleged sale in and to said wool warehouse, and/or all rights to an accounting from the said defendant to the use and/or occupation of said wool warehouse, and/or for the reasonable rental value thereof, or that plaintiffs herein have acquired and now hold all the alleged right, title and interest to said wool warehouse alleged to have been acquired by said Rose Loring Quarles, and

placing its denial on that ground denies the same; and this defendant denies that the plaintiffs herein have any or all right to receive and/or demand from the said defendant a full and/or complete accounting for the use and occupation of said wool warehouse, by the said defendant, as alleged in said Bill of Complaint, and/or all right to demand and/or to receive from said defendant all rentals, dues or damages of whatsoever kind alleged to be due and owing from said defendant to said Rose Loring Quarles, and denies that the plaintiffs or Rose Loring Quarles have any right to demand or receive from the defendant any rentals, dues or damages whatsoever, and that this defendant is without knowledge sufficient to answer whether the said G. B. Quarles has likewise, or at all, transferred and/or assigned to these plaintiffs prior to the commencement of this suit, whatsoever claim or demand he might have against said defendant on account of the alleged wrongful taking possession of said wool warehouse, and/or withholding the possession thereof as alleged in said Bill of Complaint from these plaintiffs, and/or from the said Rose Loring Quarles, as well as from said G. B. Quarles, and placing its denial on that ground denies the same.

Further answering said paragraph, this defendant alleges that if any attempted sale were made to Rose Loring Quarles of said wool warehouse, as alleged in said Bill of Complaint, or otherwise, that

the said Rose Loring Quarles did not acquire or obtain any title therein by virtue thereof, and that said alleged sale was wholly void.

V.

Answering Paragraph VII, this defendant admits that on or about April 15, 1922, the defendant, The Citizens National Bank of Salmon, Idaho, commenced an action against the said G. B. Quarles in the District Court of the Sixth Judicial District of the State of Idaho, in and for Lemhi County, and admits that on or about the 17th day of April, 1922, a Writ of Attachment was issued in said cause and placed in the hands of the Sheriff of Lemhi County for service, but denies that on or about said time, or at all, the said Sheriff pretended to levy said Writ on the said wool warehouse, being personal property situated on the railroad right of way, but alleges that said Sheriff actually did levy said Writ on said property and took the same into his possession thereunder, and denies that said Sheriff pretended to appoint a custodian to take possession of said property, but alleges that said Sheriff did actually in fact duly appoint a custodian to take possession of said property.

Further answering, this defendant denies that neither the said Sheriff nor the said custodian at any time took possession or control of said wool warehouse and denies that from and after said alleged pretended attachment and for upwards of

five months thereafter, said wool warehouse continued to be or remained in the possession of said G. B. Quarles, who used the same in his business or otherwise.

Further answering said paragraph, this defendant says it is without knowledge, sufficient to answer whether said G. B. Quarles during said time collected any or all rents or incomes therefrom during said time, and/or applied the same to his own use, and placing its denial on that ground denies the same.

Further answering, this defendant denies that the Sheriff or his deputy or custodian did not take possession or control of said wool warehouse under said Writ of Attachment in said action, and denies that said Attachment was under the laws of the State of Idaho, or otherwise, wholly void and/or ineffectual, and denies that no lien, right or interest whatsoever was acquired in said wool warehouse by said Citizens National Bank of Salmon, Idaho, under said attachment, but alleges in this connection that the said Writ of Attachment was duly issued in said cause and placed in the hands of the Sheriff of said Lemhi County, who levied said Writ of Attachment on the said wool warehouse, being the same property that is mentioned and described in said plaintiffs' Bill of Complaint, and the said Sheriff, after taking said property into his possession under said Writ of Attachment, duly and regularly appointed a custodian to take possession of

said property, and that said custodian, so appointed, did take said property into his possession and under his control and held the same as such custodian for said Sheriff under said Attachment as provided by law, and continued to hold and exercise dominion and control over said property until the same was duly sold under execution by the Sheriff to this defendant.

VI.

Answering Paragraph VIII, this defendant admits that on or about the 2nd day of October, 1922, the said District Court entered judgment in said action in favor of The Citizens National Bank of Salmon, Idaho, against the said G. B. Quarles for an amount upwards of \$5,000.00.

VII.

Answering Paragraph IX, this defendant admits that on or about the 16th day of October, 1922, the said G. B. Quarles was by the District Court of the United States, for the District of Idaho, Eastern Division, adjudged and declared a bankrupt, but is without knowledge, information or belief sufficient to answer the remaining portion of said paragraph, and placing its denial on that ground denies the same.

VIII.

Answering Paragraph X, this defendant says it has no knowledge, information or belief sufficient

to enable it to answer whether the judgment obtained by The Citizens National Bank of Salmon, Idaho, was duly listed by said G. B. Quarles in said bankrupt proceedings in the schedule of liabilities, or whether said wool warehouse was not listed as a part of the assets of G. B. Quarles, or whether the trustee in bankruptcy made no claim to said wool warehouse, and placing its denial on that ground denies the same.

Further answering said paragraph, this defendant denies that the said wool warehouse was legally sold prior to said bankruptcy proceedings.

IX.

Answering Paragraph XI, this defendant admits that on or about the 15th day of January, 1923, the said defendant, The Citizens National Bank of Salmon, Idaho, caused a Writ of Execution to be issued under its said judgment against said G. B. Quarles, and placed the same in the hands of the Sheriff to pretend to levy said Writ of Execution on said wool warehouse, but alleges that the said Citizens National Bank of Salmon, Idaho, caused said Sheriff to sell said wool warehouse under said Writ, the said property being in the possession of said Sheriff at said time under the attachment proceedings above mentioned; and denies that said wool warehouse had been legally sold to Rose Loring Quarles on September 30, 1922; and alleges that the Writ of Attachment, above mentioned, under

which said Sheriff held said property for said Bank, was issued and levied upon said wool warehouse more than four months prior to the time the said G. B. Quarles was adjudged a bankrupt; and admits said defendant caused said wool warehouse to be sold under its Writ of Execution, which was duly issued and that the Sheriff of said Lemhi County did sell said wool warehouse on the 12th day of February, 1923, to said defendant, Citizens National Bank of Salmon, Idaho, under said Writ of Execution, for the sum of \$ _____, but denies that he pretended to sell the same; denies that said sale or alleged pretended sale was absolutely or at all void or ineffectual, and denies that said sale did not vest in or transfer to said defendant any right, title or interest whatsoever in or to said wool warehouse, or any part thereof, but alleges that said sale did transfer the entire interest in said wool warehouse to this defendant, and denies that said sale was ineffectual or void; admits that the defendant took possession of said wool warehouse on or about the 12th day of February, 1923, and ever since said date has held possession thereof, but denies that it wrongfully and without right took possession thereof, or that it wrongfully or without right held the possession thereof; and denies that it has wrongfully deprived these plaintiffs and the said Rose Loring Quarles, or either of them, the possession, use and/or enjoyment thereof and of the rents and income therefrom; and denies that these

plaintiffs or that Rose Loring Quarles were entitled to the use, possession or enjoyment of said property or any rentals or income thereof, since the 12th day of February, 1923.

X.

Answering Paragraph XII, this defendant denies that it has annually collected upwards of \$1,000.00 per year, or any sum in excess of \$374.00 in the year 1923, \$461.00 in the year 1925, and \$726.00 in the years 1924 and 1926, for storage rentals and other uses of said wool warehouse, and alleges that it has expended during said time for upkeep, labor, taxes and miscellaneous expenses the sum of \$1,055.70, aside from the value of the lease hereinafter mentioned, and further alleges that during the whole of said time said wool warehouse was located upon the right of way of the Gilmore & Pittsburg Railroad, and that this defendant, since about the 12th day of February, 1923, has held a lease from said Railroad for that portion of the right of way upon which said wool warehouse is located, and has had the quiet and peaceful enjoyment of said lease from said Company, and the right to maintain said wool warehouse upon said right of way, without which there could have been no rentals obtained from said wool warehouse, and that said plaintiffs have no interest in and to said lease; denies that it has applied the moneys so collected to its own use and benefit, except first in the

payment of the expenses above mentioned, and in the payment of the reasonable value of the lease above mentioned; denies that in so doing it was prejudicial whatsoever in any manner to the rights of these plaintiffs, and denies that these plaintiffs are entitled to any of said rentals and incomes so collected by this defendant, as above mentioned.

XI.

Answering Paragraph XIII, this defendant denies that the reasonable rental value of said wool warehouse was during the years 1923, 1924 and 1925, and/or during the year 1926, the sum of \$1,000.00 per year, or any sum whatsoever, without the lease to that portion of the right of way upon which the same is located, and denies that the reasonable rental value of said wool warehouse, together with said lease is the sum of \$1,000.00 per year, or any sum in excess of \$250.00; and denies that the said defendant has, as aforesaid, or at all, wrongfully and/or without right held possession of said wool warehouse, or wrongfully or without right applied to its use and benefit the earnings, rents, incomes and/or profits thereof, to which the said plaintiffs are alleged to be entitled, and denies that said defendant has wrongfully deprived these plaintiffs of the possession and use of said wool warehouse ever since on or about the 12th day of February, 1923, or at any time or at all.

XII.

Answering Paragraph XIV, this defendant denies that the plaintiffs are without adequate remedy in the premises and denies that only on a suit of this nature can the questions here involved be adequately determined and/or justice done these plaintiffs.

Further answering said Bill of Complaint, and as a separate and additional defense thereto, this defendant alleges that at the time that the said G. B. Quarles pretended to make, execute and deliver the mortgage to H. L. McCaleb, the mortgage hereinbefore mentioned and described in this answer, copy of which is attached to plaintiffs' Bill of Complaint, the property mentioned and described in said mortgage was in custody of the law under and by virtue of a Writ of Attachment which had been levied against said property in the case of The Citizens National Bank of Salmon, Idaho, against the said G. B. Quarles in the District Court of the Sixth Judicial District of the State of Idaho, in and for Lemhi County, in this answer hereinbefore referred to, which was well known to the said G. B. Quarles and H. L. McCaleb, and that said mortgage, if valid for any purpose, was subject and subsequent to the lien of said attachment; and this defendant further alleges that said property was so held in the custody of law under and by virtue of said attachment until the same was duly and regularly sold under execution to this defendant, as herein-

before set out in this answer, and that the pretended sale of said property under the powers and terms of said mortgage, as alleged in said Bill of Complaint, was wholly void and ineffectual, and could not convey or transfer the title thereof to any purchaser at said pretended sale, and that by reason thereof the said Rose Loring Quarles or these plaintiffs did not acquire any interest or title in and to said property.

Further answering said complaint and as a separate and additional defense, this defendant alleges that on or about the 15th day of April, 1922, the said defendant, The Citizens National Bank of Salmon, Idaho, commenced an action against the said G. B. Quarles upon a bona fide claim, in the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Lemhi, being the action referred to in the Bill of Complaint, and after the issuance of summons therein a Writ of Attachment was duly issued about the 17th day of April, 1922, in said cause and placed in the hands of the Sheriff of said Lemhi County, for the purpose of levying upon the property of said G. B. Quarles, and that said Sheriff duly levied said Writ of Attachment on the said wool warehouse, being the same property that is mentioned and described in plaintiffs' Bill of Complaint and that the said Sheriff, after taking the said property into his possession under said Writ of Attachment, duly and regularly appointed a custodian to take possession

of said property, and the said custodian, so appointed, did legally take said property into his possession and under his control; and that thereafter, while said property was so held by the said Writ of Attachment in said action, to-wit: On May 29, 1922, the said G. B. Quarles, father of the plaintiffs herein, made his certain note in favor of the plaintiffs for the sum of \$4,490.88, bearing interest at 7% per annum, payable on demand, and that two days thereafter, to-wit: May 31, 1922, application was made by the said H. L. McCaleb and G. B. Quarles for the appointment of H. L. McCaleb as guardian ad litem of these plaintiffs for the purpose of instituting suit against the said G. B. Quarles upon said note, and on said day the said H. L. McCaleb was appointed guardian ad litem and filed said action, and on the same day, by the consent of the said G. B. Quarles, judgment was rendered in said last mentioned action in favor of these plaintiffs and their said guardian ad litem against the said G. B. Quarles for the sum of \$4,490.88, being the case referred to in plaintiffs' Bill of Complaint; and that on the following day, to-wit: June 1, 1922, the said G. B. Quarles, acting in conjunction with the said H. L. McCaleb, and as the defendant is informed and believes and upon that ground alleges, pretended to make, execute and deliver to the said H. L. McCaleb in his individual capacity a certain mortgage upon the property so attached as aforesaid, for the purported purpose of securing said

judgment, but which was for the purpose of hindering, delaying and defrauding the creditors of said G. B. Quarles and particularly this defendant; and that defendant is further informed and believes and upon that ground alleges that the said parties, for the purpose of further trying to place the property of the said G. B. Quarles beyond the reach of his creditors and particularly this defendant, and while said property was held under said attachment attempted to foreclose said mortgage in order to defeat the creditors of said G. B. Quarles, and in so doing contrived to have Rose Loring Quarles, the wife of G. B. Quarles, to purport to purchase in said property at such purported foreclosure sale; that the defendant further alleges that said pretended foreclosure was void, ineffectual and of no force whatever.

Defendant says it is informed and believes and upon that ground alleges that said pretended mortgage was made by the said G. B. Quarles in contemplation on his part of taking the Act of Bankruptcy; and defendant further alleges, on information and belief, that said mortgage was not made in good faith or for a consideration, and that the affidavit thereto by said G. B. Quarles that it was made in good faith and without any intent to hinder, delay or defraud any creditor or creditors of the said G. B. Quarles, was and is false.

This defendant further alleges, on information and belief, that all the acts hereinbefore enum-

erated on the part of G. B. Quarles and H. L. McCaleb and Rose Loring Quarles, who were relatives of these plaintiffs, as aforesaid, were made collusively and for the purpose on the part of said parties and each of them to hinder, delay and defraud the creditors of said G. B. Quarles and this defendant in particular. That the action so brought by this defendant, upon which said attachment was issued, was based upon a good and valid claim, which claim was thereafter reduced to judgment and which judgment was duly and regularly entered in the records of Lemhi County, State of Idaho, and the property so attached and held under said attachment was duly and regularly sold by execution under the said judgment to this defendant on or about the 9th day of September, 1923, and that this defendant ever since said time was and now is the owner of said property and entitled to the possession thereof and that the plaintiffs have no right, title and interest therein.

Further answering said complaint and as a separate and additional defense, this defendant alleges that on or about the 15th day of April, 1922, the said defendant, The Citizens National Bank of Salmon, Idaho, commenced an action against the said G. B. Quarles upon a bona fide claim, in the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Lemhi, being the action referred to in the Bill of Complaint, and after the issuance of summons therein

a Writ of Attachment was duly issued about the 17th day of April, 1922, in said cause and placed in the hands of the Sheriff of said Lemhi County, for the purpose of levying upon the property of said G. B. Quarles, and that said Sheriff duly levied said Writ of Attachment on the said wool warehouse, being the same property that is mentioned and described in plaintiffs' Bill of Complaint and that the said Sheriff, after taking the said property into his possession under said Writ of Attachment, duly and regularly appointed a custodian to take possession of said property, and the said custodian, so appointed, did legally take said property into his possession and under his control; that thereafter the said G. B. Quarles, defendant in said action, appeared in said action and made a motion to discharge the said wool warehouse property from said attachment on the ground that an excessive amount of property had been attached, in which motion the wool warehouse was particularly mentioned as being worth \$4,000.00, and on July 28, 1922, the motion to discharge or release said wool warehouse property from said attachment was denied, and the amount of a release bond was fixed; that the said G. B. Quarles did not in said motion allege or assert or attempt to show at the hearing thereon that there was any defect in said attachment proceedings, and that his motion was entirely based upon the ground that there was an excessive amount of property attached; that on May 29, 1922, said G. B. Quarles,

father of the plaintiffs herein, made his certain note in favor of the plaintiffs for the sum of \$4,490.88, payable on demand, and that on May 31, 1922, application was made by the said G. B. Quarles and H. L. McCaleb for the appointment of said H. L. McCaleb as guardian ad litem of these plaintiffs for the purpose of instituting suit against the said G. B. Quarles upon said note and that on said day the said H. L. McCaleb was appointed guardian ad litem and filed said action, and on the same day by the consent of said G. B. Quarles judgment was rendered in said last mentioned action in favor of these plaintiffs and their said guardian ad litem against the said G. B. Quarles for the sum of \$4,490.88, being the case referred to in the plaintiffs' Bill of Complaint; and that on the following day, to-wit: June 1, 1922, the said G. B. Quarles, acting in conjunction with H. L. McCaleb, pretended to make, execute and deliver to the said H. L. McCaleb in his individual capacity a mortgage upon said wool warehouse, a copy of which is attached to plaintiffs' Bill of Complaint.

And defendant further alleges that in the petition for the appointment of said H. L. McCaleb as guardian ad litem, it is set forth and alleged, among other things, that the appointment of a guardian ad litem is necessary to enable the plaintiffs herein as minors to prorate in the proceeds of the sale of the property attached in the said case

of The Citizens National Bank of Salmon vs. G. B. Quarles, above mentioned.

And this defendant further alleges that the mortgage, above mentioned, purporting to cover the said wool warehouse, being the property attached as aforesaid, contains, among other things, a recital therein that the said mortgage does not waive, on the part of the mortgagee therein named, Hugh L. McCaleb, the right as a judgment creditor of G. B. Quarles to share in the proceeds of the sale of any attached property attached in the suit of the said Citizens National Bank of Salmon against the said G. B. Quarles; that by the recitals contained in said petition for the appointment of guardian ad litem, as aforesaid, and the recitals in said mortgage, and by reason of the other matters and things hereinbefore mentioned, the said G. B. Quarles and H. L. McCaleb recognized and acknowledged that the said Citizens National Bank of Salmon, the defendant herein, had duly and regularly levied upon the said wool warehouse in the suit of The Citizens National Bank of Salmon vs. G. B. Quarles, and that said attachment was in full force and effect at the time that the said guardian ad litem was appointed, as aforesaid, and the execution of said alleged mortgage, and that the said H. L. McCaleb and G. B. Quarles at no time questioned the right of the defendant under his said attachment other than the application of the said G. B. Quarles to have said property released from the said attachment on the

ground that there was an excessive amount of property attached, as aforesaid; and that by reason of the matters and things hereinbefore alleged, the said plaintiffs, who claim their interest in and to said property under and by virtue of the said mortgage and the said H. L. McCaleb and G. B. Quarles and Rose Loring Quarles have waived any right to assert that said attachment of the defendant was not good and valid, and are estopped to assert in this action that the plaintiffs or either of them ever had any lien by virtue of said alleged mortgage upon said wool warehouse except a lien subject and subordinate to the lien of the defendant's attachment, and estopped to question the validity of the defendant's levy under its attachment.

WHEREFORE, DEFENDANT having thus made a full answer to all the matters and things contained in the Bill of Complaint, this defendant prays that the Bill be dismissed and that this defendant have such other and further relief as to equity may appertain and to this Honorable Court may seem reasonable and meet in the premises, together with its costs in this behalf incurred.

T. D. JONES

C. W. POMEROY

RALPH H. JONES

Solicitors for Defendant.

Residence and P. O. Add.:

Pocatello, Idaho

(Duly Verified)

Endorsed: Filed Sept. 24, 1926.

W. D. McREYNOLDS, Clerk.

By Theo. J. TURNER, Deputy.

(Title of Court and Cause)

No. 628

STATEMENT OF EVIDENCE UNDER
EQUITY RULE NO. 75

BE IT REMEMBERED that pursuant to notice duly given and stipulation of the parties duly extending the time for the taking of such depositions, the depositions of ROSE LORING QUARLES, G. B. QUARLES and JOHN VERNON QUARLES, witnesses on behalf of plaintiffs, were duly taken at Lankershim, California, on April 22, 1927, before Donald M. Redwine, a Notary Public in and for the County of Los Angeles, State of California.

The witness ROSE LORING QUARLES being duly sworn testified on direct examination:

I am the wife of G. B. Quarles. I was married to him at Hope, Idaho, in 1910 and have lived with him as his wife since that time. I lived in Salmon City, Idaho for 12 years after my marriage. I left there in 1922. I remember the warehouse near the railroad station. I was present when the property was auctioned off in 1922 by Mr. J. L. Kirtley, Deputy Sheriff. The property was knocked off to me

and I was announced as the purchaser at that time. Afterwards Mr. Kirtley gave me a bill of sale. I kept this until it was given to John Vernon Quarles. I gave Mr. Kirtley \$25.00 for the sale. This was my separate money and Mr. Quarles had no interest in it. After I got the bill of sale the key was given to me by Mr. Kirtley, the same day. We did not do anything with the property until I turned it over to W. C. Smith. Less than a month after the sale we left Salmon for California and I have not been back to Salmon since. When we left I turned the key and the possession of the warehouse to W. C. Smith of Salmon City. J. L. Kirtley was in charge of the warehouse at the time of the sale to which I refer. I gave John Vernon Quarles a Bill of Sale to the property which is dated Septembebr 11, 1925 and is marked Plaintiffs' Exhibit "B". I had been at the warehouse at various times during the summer of 1922. At these times the warehouse was in the possession of G. B. Quarles. I have seen him locking the warehouse during the summer of 1922 and I have seen him at work there during the summer managing and around the warehouse quite a bit. The warehouse was being used for wool. Wool was being hauled in to the warehouse from ranches and shipped from there. Later G. B. Quarles and I executed another agreement conveying this property. I signed plaintiff's Exhibit "C" with my husband and after it was signed it was delivered to John Vernon Quarles.

Plaintiffs' Exhibit marked "B" for identification was attached to the deposition. This exhibit is an instrument entitled Bill of Sale and is dated September 11, 1925, and is signed by Rose Loring Quarles and recites that the party signing the same hereby sells, assigns, transfers and conveys unto John Vernon Quarles all of my right, title and interest of, in and to the said wool warehouse, together with a certain verbal lease between the Gilmore & Pittsburg Railway Company and G. B. Quarles to occupy the land on which the building is constructed, to have and to hold unto John Vernon Quarles, his heirs and assigns.

Plaintiffs' Exhibit marked "C" for identification was attached to the deposition. This exhibit is an instrument entitled "Bill of Sale and Assignment" and is dated June 28, 1926, and is signed by G. B. Quarles and Rose Loring Quarles and recites that the parties signing the same thereby sell, transfer, convey and set over unto John Vernon Quarles and Hope Virginia Finn, of Lankershim, California, share and share alike, all their right, title and interest in and to the wool warehouse heretofore referred to, together with the right to occupy said property, and further assign, transfer, and set over unto said parties all moneys due the parties signing the same from The Citizens National Bank of Salmon, Idaho, on account of damages for withholding possession of said wool warehouse and occupying and using the same since on or about the

12th day of February, 1923, and all rights which the parties signing the same have to an accounting for rents, income, and profits from use and occupancy of said wool warehouse by the said Citizens National Bank. Said exhibit further recites that the wool warehouse was purchased by Rose Loring Quarles on or about September 30, 1922, for the use and benefit of said John Vernon Quarles and Hope Virginia Finn, who were then minors under the age of twenty-one and eighteen years, respectively, and that this transfer and assignment is intended to take effect as of said date but is also intended to convey any and all interest of whatever kind, or howsoever acquired, which the parties signing the same may have in and to said wool warehouse and in and to any claims and demands against the Citizens National Bank of Salmon, by reason of its dealings with, and occupancy and possession of the same.

The witness Rose Loring Quarles continued on direct examination:

“No one has ever paid me anything for the use of the warehouse and I have not received anything as damages from anyone for the taking of the warehouse.”

On cross-examination by counsel for defendant the witness Rose Loring Quarles testified:

“Mr. Quarles was present when I bid in the warehouse. It is located on the right-of-way of the Gilmore & Pittsburgh Railway. Mr. G. B. Quarles had

charge of the warehouse a short time before I bought it. The sale was in charge of Mr. Kirtley. He had the keys and was in possession of the property at that time. Mr. Quarles had charge of it ever since it was built. I don't know that he was in it after I bought it. The warehouse was bought on September 30th and we left Salmon along about the middle of October, 1922. I had Mr. Quarles turn the warehouse over to W. C. Smith to look after it. I turned it over to Mr. Quarles, Jr., in September, 1925. I bought it at the suggestion of both myself and Mr. Quarles."

The witness G. B. QUARLES, being duly sworn, testified on direct examination:

"I have lived in Los Angeles, California, since October 23, 1922. Prior to that time I lived in Salmon, Idaho, since March, 1895. I executed a note to my children John Vernon Quarles and Hope Virginia Quarles in May, 1928. I don't remember the exact amount. I think it was Forty-four Hundred Dollars. I gave this note to their uncle, Hugh L. McCaleb, who was my wife's brother. He resided at Dillon, Montana, at that time. I gave the note to him at Salmon, Idaho. It was made payable to John Vernon Quarles and Hope Virginia Quarles. The consideration for this note was money advanced to me by their mother and interest computed at seven per cent. from the time I received it. Their mother's estate was never probated. She did

not leave any debts owing to anyone. She did not have any creditors of any kind or nature at the time of her death. John Vernon Quarles was born October 14, 1903, and Hope Virginia Finn was born July 26, 1907. I built the wool warehouse and took possession of it at the time it was built. The size of the warehouse is 80 x 48, exclusive of a platform on the outside which is 8 x 48. The warehouse is built on concrete piers. George H. Monk and myself had equal interest. The warehouse was built in May, the date of the first Liberty Loan. I purchased Mr. Monk's interest in the warehouse. The warehouse is built on land belonging to Gilmore & Pittsburgh Railway Company and I had a lease from this Company. The bill of sale of Mr. Monk's interest in the warehouse was delivered to me November 20, 1918. After this bill of sale was delivered to me I had exclusive possession of this warehouse. Physically I had exclusive possession from the date on which it was built until the date of Sheriff's sale under foreclosure of the chattel mortgage which was about September 30, 1922. I recall the action commenced against me by the Citizens National Bank of Salmon, Idaho, in February 1922, and the writ of attachment issued in that action. The warehouse was not attached by the Sheriff in that action. No notice was posted on the warehouse by the Sheriff in that action. I was not disturbed in my possession at all during the year 1922 up to the time of the Sheriff's sale on the foreclosure of

the chattel mortgage of which I have spoken. No one ever demanded the keys of this property from me. I never saw anyone there that claimed to be in possession of it. During the year 1922 I used the property as a warehouse for the purpose of receiving and shipping wool, machinery and road material. The business was largely receiving, storing and shipping wool. I received the wool from the flock masters of Lemhi and Custer counties in Idaho. The wool came into the warehouse in bags and was shipped in bags. I shipped it for the people who owned the wool. The wool season in 1922 closed sometime before the 1st of October. The season of 1922 was an average one as far as wool shipping was concerned. There was no other wool warehouse at any time in Salmon, Idaho, that was used for the purpose of shipping this wool. I had the key to the warehouse at all times in 1922 until the Sheriff took possession on the foreclosure of this chattel mortgage. I recall the time of the sale of this warehouse by the Sheriff of Lemhi County under foreclosure of this chattel mortgage. The sale was made by James L. Kirtley, Jr., deputy sheriff. I was present at the sale. I believe it was about September 30th. There was only one bid on the property. This was made by Rose Loring Quarles, my wife. The Sheriff gave her the keys at the time of the sale. He took them from me at the time he took possession of the warehouse. After the sale of this property to Mrs. Quarles the keys and the

possession of the property were turned over to W. C. Smith of Lemhi County. This was somewhere between the 30th of September, 1922, and the 12th of October, 1922. Mr. Smith had the keys when we left Salmon City. We left on the 12th of October, 1922. I did not sell any interest in this property to anyone up to the time I gave the mortgage. In 1922 the warehouse was under lock and key when I was not there. When I left the warehouse I locked it up. Before the wool season began and after the wool season began part of the time I was there every day from early to late and part of the time I was not there at all. Some days not at all, but many days from early to late. I was not in the warehouse at the time this attachment was issued in 1922. I was sick that day. It might have been a week or two or three days after the attachment was had that I was there. When I went there, there was nobody there. No one notified me that he was custodian of the warehouse. There was no one custodian of the warehouse. Absolutely no one claimed possession of it. I heard of absolutely no one having or claiming possession of the warehouse. This is true of all times in 1922 up to the time the Sheriff took possession of it under the foreclosure of the chattel mortgage.

“Q. Did you talk to Mrs. Quarles about purchasing the warehouse?

A. Yes. I said that she should buy it and that

I would be able to pay the judgment or that the warehouse would go to John and Virginia.

Q. Did she ever make any conveyance of that warehouse to you?

A. She never did.

Q. Did you ever have any interest in the warehouse after she bought the property in at foreclosure sale?

A. No.

Q. Did you ever claim an interest in the warehouse after that time?

A. No.

Q. Has anyone ever paid you anything for the use of the warehouse since that time?

A. No."

On cross-examination by counsel for defendant the witness G. B. Quarles testified:

"The note to my children I believe was made on the 31st of May, 1922. The following day I had Hugh McCaleb appointed as guardian for the two children and the day following that suit was brought on the note and judgment confessed for \$4,490.88. On the 1st day of June of the same year I executed a mortgage to H. L. McCaleb upon the warehouse property, which was the mortgage that was foreclosed. Prior to that time some two or three months suit had been brought against me by the Citizens National Bank of Salmon, and an attachment issued. They served on me a copy of the complaint, copy of the summons and a copy of the

writ of attachment and a notice that certain property was attached and I think the notice specified the particular property attached. At the time the writ of attachment and notice was served on me the Bank did not put a keeper in charge of any of my property. They never demanded of me the key to the warehouse. They never took possession of the warehouse. There was a notice served on me.

Q. I presume the notice was the usual notice on the back of the writ of attachment?

A. Attached to the writ of attachment. It was a typewritten notice that the Sheriff had attached certain property, describing them, including my home, the California Bar Placer Mining claims, certain lots in Finstur's subdivision, Salmon, the Red-bird mines, \$21,000.00 worth of stock in the Citizens National Bank.

Q. You knew that the warehouse had been attached?

A. I know he (the sheriff) said it was going to be attached.

Q. Wasn't that the reason why you changed the lock?

A. No, I had valuable wool in there.

Q. You were served with attachment papers?

A. I was.

Q. You knew the wool warehouse was attached?

A. He said it was going to be attached.

Q. Didn't he tell you he had attached it when he served the papers?

A. No sir—said he was going to.

Q. You knew that the wool warehouse had been attached at the time that you gave the mortgage on the warehouse?

A. No sir.

Q. You received notice of attachment didn't you?

A. Yes.

Q. So that you must have had notice that the warehouse was attached if you received the notice?

A. No.

Q. The attachment notice was served prior to the time you gave the mortgage?

A. Yes.

Q. And prior to the giving of the mortgage you had received this notice?

A. Yes.

Q. And afterwards at the proceedings in the case of Citizens National Bank v. yourself you made a motion to dissolve the attachment?

A. Yes.

Q. In that motion to dissolve you specifically enumerated your mining property, city lots, warehouse, etc.?

A. Yes.

Q. So that you must have known at the time the motion was made that the warehouse was attached?

A. The motion speaks for itself and says that

the Sheriff purports to have attached the warehouse—the fact of the matter was he didn't.

Q. That is your opinion?

A. Yes.

Q. When you testified before the Commissioner at Los Angeles you testified that this typewritten notice that the Sheriff had attached your property was served upon you. Do you have that notice now?

A. If I have it Mr. Haga has it.

Q. You testified it was a typewritten notice that the Sheriff had attached certain properties, describing them, including my home, the California Bar Placer Mining claims, certain lots in Salmon, the Redbird Mines, \$21,000 worth of stock in the Citizens National Bank?

A. I think so?

Q. Only one notice was served upon you?

A. I think so.

Q. And that included the wool warehouse as well as other property?

A. Yes.

Q. I presume Mr. McCaleb in his action here was prompted entirely by your suggestion?

A. It was his desire to protect his niece and nephew.

Q. He was the uncle of your two children and your brother-in-law?

A. He was.

Q. And the suits were brought at your suggestion and request?

A. They were.

Q. You later moved to discharge the attachment, Mr. Quarles, on the ground that an excessive amount of property was levied on?

A. I did and the Court declined the motion.

Q. In that action was any specific mention made of the warehouse?

A. I think there was. Yes.

“I endeavored to have it released as to the warehouse especially for the reason that the Sheriff had in his return of attachment shown that he had attached the warehouse and put a keeper in charge of the warehouse. The question of whether there was a keeper in charge of the warehouse was not one of the questions that arose at the time I moved to have the attachment dissolved. The reason for the motion was the excess levied. He mentioned in his return that he had attached it, that was why the warehouse was mentioned. In the mortgage which I gave to McCaleb, as is set forth in the mortgage, I made a recital that I did not waive on the part of the mortgagee the writ of attachment or a guarantee of share in the proceeds of the attached property. The motion went to discharge the major portion of the property, but I think the \$21,000.00 worth of Bank stock was not covered. The motion was to discharge from the attachment all of the

property excepting the \$21,000.00 worth of Bank stock. The motion speaks for itself.

The witness JOHN VERNON QUARLES, being duly sworn, testified on direct examination:

"I reside in Lankershim, California, I am 23 years old and I have lived here a little over one year. Before I came to Lankershim I spent four years in Exeter, New Hampshire and a little over four years in Princeton, New Jersey, for the purpose of education. My home has always been with my father. When my father was in Idaho my home was with him. I spent my summer vacations in Idaho. In 1921 I spent the summer months of July and August and part of June and September there and about the same period in 1922. I am acquainted with the location of the wool warehouse which my father owned at that time. It was on the right-of-way of the Gilmore & Pittsburgh railroad, some one thousand feet west of the depot on the same railroad. I saw the warehouse in 1921 on numerous occasions when my father was in the discharge of the business for which the warehouse was constructed. I would say that I saw it about five times a week that summer. My father had possession of it at that time. He was using it to conduct the business of receiving, storing and shipping wool. During 1922 I was in Salmon part of June, all of July, all of August and part of September. During that time I saw the warehouse approximately five times a week. My father was in possession of it

at that time. It was being used for the purpose of receiving, storing and shipping wool and for other purposes. My father had the keys at that time. I saw him unlock the warehouse on every occasion when I accompanied him there during that period. The warehouse had two doors both completely closed. When the doors were closed no one could get in with the possible exception of scaling a window in the gables used for ventilation. Both doors have locks, one locking from the outside, the other from the inside. On numerous occasions in 1922 I assisted my father. I never saw anyone else with the keys in 1922 and never saw anyone else who claimed to have possession. I never saw anyone else but my father delivering wool or getting wool out in 1922. I did not see any notice of any kind posted on the warehouse when I was there in 1922. I left in September that year before my father left. I did not see anyone around there who claimed to be in possession of the property except my father. I am acquainted with T. J. Stroud, Sheriff of Lemhi County, Idaho. I did not have any conversation with him in 1922 about having possession of this warehouse. I know Mr. H. G. King and I did not have any conversation with him at any time in regard to possession of this warehouse."

Pursuant to notice duly given and stipulation of the parties duly extending the time for taking such depositions, the depositions of H. G. KING, W. W. SIMMONDS, T. J. STROUD, W. C. SMITH and

J. Z. MOORE, witnesses on behalf of plaintiffs, were duly taken as follows: W. C. Smith, W. W. Simmonds, T. J. Stroud and H. G. King on May 3rd, 1927, and J. Z. Moore on May 9, 1927, all at Salmon City, Idaho, and all before L. E. Glennon, a Notary Public in and for the State of Idaho.

The witness H. G. KING, being duly sworn, testified on direct examination:

“I am 68 years old and I live at Salmon, Idaho. My occupation is gentleman of leisure. I have lived at Salmon 20 years and lived there throughout the year 1922. I remember the attachment proceedings in the suit of the Citizens National Bank of Salmon against G. B. Quarles. I was appointed custodian of the attached property by the Sheriff Tommy Stroud. I think it was the deputy that did the business with me. The Sheriff or his deputy, Mr. Kirtley, came and asked me one day in the bank whether I would act as custodian of the warehouse in that attachment suit. He stated that the law required them to have a custodian appointed. I remember at the time he said the duties would not be very strenuous and would not take much of my time if I would accept the appointment, and I told him that I would. At that time he left me one key of the warehouse. I was over quite a number of times. I forget whether I went over the same day I was appointed or not. I might add though if I remember rightly he told me I would not have to do anything with the contents of the warehouse. It was

just the warehouse I was custodian of. The warehouse was locked. I don't know of any other person who had keys to the warehouse and I did not put any new locks on the warehouse. This is the wool warehouse that is located on the right-of-way of the Gilmore & Pittsburgh Railroad about one thousand feet west of the depot at Salmon. G. B. Quarles did not operate that warehouse at the time I was custodian of it to my knowledge. I didn't see him there. I couldn't state the exact number of times I was actually in the warehouse after I was appointed custodian but I do know of several occasions that I had to go over there. Once or twice I went over with Mr. Boomer's representative, Mr. Rodgers, who had a portion of that warehouse partitioned off where he had supplies and I went over and opened the outer door for Mr. Rodgers. I think it was in April, 1922, I was appointed custodian. I was never notified that I was not custodian up to the present time. I have no official notice as to my appointment being cancelled. I rather think the warehouse was used as a wool warehouse during my custodianship. People were storing wool and taking it in and out. I don't know who had charge of the moving of the contents. I had a key and whoever was permitted to go in there, I let them in when I knew they were legally entitled to go in and their stuff there. I did not collect any revenue or rent or storage on the warehouse when I was in

charge. I don't know whether they were collected or not."

On cross-examination by counsel for the defendant the witness H. G. King testified:

"It was J. L. Kirtley, the deputy sheriff who appointed me. At the time the appointment was made Mr. Kirtley handed me the key. I kept the warehouse locked when I was not present. I was by the warehouse every day. I was going back and forth home and I passed the warehouse whenever I went back and forth. I know Frank H. Haveman well. He did not at any time when I was in charge of the warehouse attempt to dispute my right to the control and dominion over the warehouse. G. B. Quarles never disputed my control, right or dominion. In fact no one did. No one to my knowledge had any key to the warehouse except myself. During the time I was in possession of the warehouse Mr. Quarles never to my knowledge attempted to act in charge of it. I recall the sale of this warehouse during February, 1923, in the action of Citizens National Bank against Quarles. I don't know who had charge of it at that time for the simple reason that I have never been discharged so far as I know. Since it was sold I think the Citizens National Bank operates it for storing wool for their customers. During the time I was in possession in the year 1922 I don't remember having been served with any foreclosure papers and I did not during that year at the request of the Sheriff sur-

render up the building to anyone, and the Sheriff did not to my knowledge attempt to put anyone in charge of the building in place of me.”

On re-direct examination by counsel for plaintiffs the witness H. G. King testified:

“I had a conversation with Mr. Kirtley first. He came and asked me if I would act as custodian and then he said I will have the papers drawn up and the appointment made and it was on the second occasion that the appointment was made and he handed me the key and told me that I was appointed custodian.”

On re-cross examination by counsel for defendant the witness H. G. King testified:

“I don’t recall whether I executed any paper that I would act as custodian. I remember that the warehouse was sold under attachment to the Citizens National Bank. When the property was sold I had no written or verbal notice from the Sheriff that my duties as custodian had ceased. I did have actual notice that the property had been sold to the Citizens National Bank by the Sheriff and after that time I didn’t attempt to control or exercise acts of dominion over the property. That was because of the fact that the Bank had bought the property.”

The witness W. W. SIMMONDS, being first duly sworn, testified on direct examination:

“I am the clerk of the District Court and ex-

Officio Auditor and Recorder in and for Lemhi County, Idaho, and have held this position since the second Monday of January, 1919. As such I have the custody and control of all court records.”

It was then admitted that Mr. Simmonds is clerk of the court and that he is the legal custodian of records and papers pertaining to his office.

Whereupon the following Exhibits were identified by Mr. Simmonds and were admitted in evidence:

Plaintiff's Exhibit "E": The petition for appointment of a guardian ad litem in the case of John Vernon Quarles and Hope Virginia Quarles, infants, by H. L. McCaleb, guardian ad litem, plaintiff, against G. B. Quarles, defendant; filed May 31, 1922, signed by H. L. McCaleb and G. B. Quarles; containing the following recitals: H. L. McCaleb is an uncle of the minors; that The Citizens National Bank has commenced an action against G. B. Quarles and attached the property of the said Quarles; that the guardian ad litem is necessary so that the minors may obtain judgment and pro rate in the proceeds of the sale of the attached property.

Plaintiff's Exhibit "C": A chattel mortgage dated June 1, 1922, from G. B. Quarles, mortgagor, to H. L. McCaleb, mortgagee, covering the wool warehouse being a frame structure, sides and roof of iron and concrete foundation, also one certain automobile as additional security to secure the payment of a judgment against the mortgagor in favor

of the mortgagee as guardian ad litem of said minors, which judgment is dated May 31, 1922, and which mortgage recites that the mortgage does not in any way waive the right of the judgment creditor of the mortgagor to share in the proceeds of any property attached in the suit of Citizens National Bank against G. B. Quarles. Mortgage recorded at the request of the mortgagee June 1, 1922.

Plaintiff's Exhibit "G": Writ of Attachment issued out of the District Court of the State of Idaho, for Lemhi County, in the case of The Citizens National Bank of Salmon, a corporation, plaintiff, against G. B. Quarles, defendant, dated and sealed April 15, 1922, directing the Sheriff of said County to attach and safely keep all the property of the defendant to satisfy plaintiff's demand of \$5456.99.

The Sheriff's return on the said Writ of Attachment, executed by T. J. Stroud, Sheriff, by J. L. Kirtley, Deputy, dated April 17, 1922, stating that he attached certain real estate and shares of stock of the defendant and also containing the following recitals: I attached that certain building known as the wool warehouse, the same being designated by plaintiff as personal property, levied upon as such and placed in the hands of H. G. King, as custodian.

Plaintiff's Exhibit "F", containing a motion to discharge attached property in the case Citizens National Bank against Quarles, in the District Court of Lemhi County, Idaho, dated and filed July 14, 1922, signed by G. B. Quarles in person, on the

ground that the amount of property attached is excessive, and which motion contains among other matters the following recitals: the Sheriff reports to have levied upon as personal property that certain wool warehouse which is the property of said defendant; that the writ was levied April 17, 1922, and that the time has lapsed within which other creditors could procure judgments and pro rate in the proceeds of the sale of the attached property; that the defendant moves that all of the property so attached with the exception of 185 shares of the stock of the Citizens National Bank be discharged from the lien of attachment and that the discharge be established of record except as to said stock.

An order denying the said motion to discharge attached property, dated July 28, 1922, filed August 3, 1922, in the case of Citizens National Bank against Quarles, except upon the bond given by the defendant in the sum of \$6500.00 as provided by Section 6811, Idaho Compiled Statutes.

Defendant's Exhibit 1, containing a Writ of Execution out of the said District Court in the case of Citizens National Bank against G. B. Quarles dated and sealed January 15, 1923, directed to the Sheriff of Lemhi County and containing among other matters the following recitals: That it is based upon a judgment for \$5291.38 entered in said case on October 2, 1922, all of which is unpaid; that the following described property, as well as other property was attached on April 15, 1922, all right, title and

interest of G. B. Quarles in and to the said wool warehouse; commanding the said Sheriff to sell the said property to satisfy the said judgment. The Sheriff's return attached thereto is dated February 12, 1923, and contains among other matters the following recitals: that on January 15, 1923, the Sheriff relieved on the said wool warehouse, noticed the same for sale as the law directs and on January 22, 1923, sold the wool warehouse to E. E. Edwards for the Citizens National Bank.

The witness T. J. STROUD, being duly sworn, testified on direct examination:

"I was Sheriff of Lemhi County during the years 1922 and 1923; during said time a levy of attachment in the case of Citizens National Bank vs. G. B. Quarles was made by my office; J. L. Kirtley, who was Deputy Sheriff at that time, served the papers. I did not personally serve or levy any Writs of Attachment in that case. I always went over the papers and attachments in cases of this kind before they left the office."

On cross examination by counsel for defendant the witness T. J. Stroud testified:

"I went over the papers in the office in the case in question before they were served. Mr. Kirtley prepared the papers and after they were prepared I went over them. A summons, attachment and notice of attachment were given to Mr. Kirtley to serve. The notice was to the effect that certain

property is attached—the warehouse. I don't find a copy of the Notice of Attachment that was to be served upon Mr. Quarles attached to plaintiff's Exhibit "G". There is one thing I would like to have understood; when these papers were returned I wouldn't say the notice was attached to the writ, but it left the office to be served upon Mr. Quarles. I went over the matter of the service of the papers with Mr. Kirtley. When Mr. Kirtley came back he gave me a list of the papers that were served and he copied them on the Day Book and I copied them on the Attorney's Record, all papers that were served in the case. I made a charge on my book for a Notice of Attachment, that the warehouse was attached. It will appear on my book in the charge I made for the copies. I don't think that I instructed Mr. Kirtley to serve the notice that the wool warehouse was attached, upon Mr. Quarles, along with the Writ of Attachment, as Mr. Kirtley knew. Mr. Kirtley had served papers a great many times during that time. I instructed him to be careful about serving papers in the case. When Mr. Kirtley came back after serving the papers he did not have in his possession the notice that was to be served upon Mr. Quarles. Mr. Kirtley is now dead. When Mr. Kirtley left the office to serve these papers he took with him the original notice that the warehouse was to be attached. When he returned he did not have the original. Mr. Kirtley told me that he served the papers on Mr. Quarles and he gave me a list of

them and this list included a copy of the Writ of Attachment and a copy of the notice to Mr. Quarles that the wool warehouse in his possession was attached by virtue of the Writ.”

On re-direct examination by counsel for the plaintiff the witness T. J. Stroud testified:

“In regard to the service of papers in the case of Citizens National Bank vs. G. B. Quarles in the attachment procedure, I stated that a notice that certain personal property was attached was taken out to be served upon Quarles. It was the custom of my office in some cases to serve the Notice of Attachment on persons whose personal property was attached; the form of notice was just simply a notice that this certain warehouse was attached. I had a Writ of Attachment, also a typewritten notice. I think something is left out of the Sheriff’s return on attachment in plaintiff’s Exhibit “G” referring to the certain Writ or Notice. I am familiar with Mr. Kirtley’s handwriting. The return was made by him. I don’t know of my own knowledge whether Mr. Kirtley served the notice that the property was attached by virtue of the Writ. I wasn’t with him. I wouldn’t say.”

On re-cross examination by counsel for the defendant the witness T. J. Stroud testified:

“When I say that the Sheriff’s return on attachment does not contain everything that was done I mean that it didn’t contain a statement of the fact that a notice that the wool warehouse in question

under the control of G. B. Quarles and belonging to him was attached by virtue of the Writ of Attachment. I wouldn't say it was served. I could say it left the Court House. Mr. Kirtley gave me a list and if that statement of Mr. Kirtley's was correct it should have contained a statement of what he did."

On re-direct examination by counsel for the plaintiff the witness T. J. Stroud testified:

"Plaintiff's Exhibit "D" is the return in the case of H. L. McCaleb, guardian of John V. Quarles and Hope Virginia Quarles vs. G. B. Quarles under summary foreclosure of chattel mortgage. The affidavit for foreclosure of the chattel mortgage and the Notice of Sale were placed in my hands for service and I served it upon G. B. Quarles and I took into my possession the personal property therein specified, which property consisted of the wool warehouse and a seven-passenger six-cylinder Studebaker touring car. The warehouse is on the G. & P. right-of-way near Salmon. I think I also served a demand for peaceable possession on G. B. Quarles and a Notice of sale of the summary foreclosure proceedings; I obtained peaceable possession of the property and it seems to me that in furtherance of these foreclosure proceedings we appointed Frank H. Havemann as keeper. We posted Notice of Sale on September 25, 1922, and in pursuance of these notices we held the sale on Septem-

ber 30, 1922. I sold the property to Rose Loring Quarles."

On re-cross examination by counsel for defendant the witness T. J. Stroud testified:

"I am under the impression that it was G. B. Quarles who handed me the papers that I have been describing for the foreclosure of this mortgage. I am not sure. At the time I stated that I served the notice upon G. B. Quarles it was subsequent to the time that I had already attached the property for the Citizens National Bank. I already had in my possession this wool warehouse under the Writ of Attachment that was levied on April 17, 1922, at the time these foreclosure papers were handed me and whatever I did was done subject to the Writ of Attachment. At the time the foreclosure proceedings were taken the wool warehouse was in my hands and also in the hands of Mr. King as custodian by virtue of the Writ of Attachment. When I appointed Havemann as custodian for the foreclosure proceedings his duties were subject and subsequent to the duties of Mr. King. In my return on the foreclosure proceedings I set forth that I offered all the right, title and interest of G. B. Quarles and that was the right, title and interest subject and subsequent to the attachment that was already on it. My return shows that Rose Loring Quarles was the highest and best bidder for all the right, title and interest of G. B. Quarles in and to that property and I sold such interest for the sum of \$25.00

to Rose Loring Quarles. I don't remember whether Rose Loring Quarles ever paid me any money. When I say that I obtained peaceful possession of the warehouse I meant that I already had it and took it again and sold it under this foreclosure subject to the attachment. I don't know who prepared the affidavit for foreclosure of chattel mortgage by notice and sale."

On re-direct examination by counsel for the plaintiff the witness T. J. Stroud testified:

"I hardly think Mr. Kirtley drew up the return on the chattel mortgage foreclosure proceedings in plaintiff's Exhibit "D". In regard to that part of the return where it says 'I offered to sell all the right, title and interest of G. B. Quarles, mortgagor, in and to aforementioned wool warehouse' it was my custom and the custom of the Sheriff's office at the time I was in it in making sale of property under any kind of process to use those words, and that was all the Sheriff could sell in fact. When I stated that I made the sale under that foreclosure under notice and sale subject to a previous attachment of the Citizens Bank I do not wish to be understood as passing upon the priority of those two liens."

Q. You stated of having possession of the wool warehouse at the time of the Summary Foreclosure, you didn't have actual possession of that property?

A. Had a keeper.

Q. Had possession through the keeper, Mr. H. G. King?

A. Yes sir.

Q. You didn't have actual personal possession yourself, you didn't act as keeper yourself?

A. No.

The witness W. C. SMITH, being duly sworn, testified on direct examination:

"I live in Salmon, Idaho, and am acquainted with G. B. Quarles, John V. Quarles and Hope Virginia Quarles. My business is abstracting. In addition to running the abstract business I sometimes act as a buyer of wool for Adams & Leland of Boston. I was acting as such buyer in 1922 and purchased wool in Lemhi County in that year. The wool which I purchased was stored in the warehouse on the Gilmore & Pittsburgh right-of-way in Salmon. E. E. Edwards had charge of it during the year 1922. He was president of the Citizens Bank. G. B. Quarles was in possession of it in the forepart of 1922 up to August 1st. I think it was in the fall of 1922 that G. B. Quarles left Salmon, according to my records. The man who owned this wool paid the storage charges to Mr. Quarles. In the fall of 1922 G. B. Quarles informed me that the warehouse was the property of Rose Loring Quarles. Mr. Quarles said if I would take charge of it from the time he left the 1st of August, 1922, I could have twenty-five per cent. of what was taken in from the wool warehouse. I opened an account in my books with Rose Loring Quarles. There were charges for storage under the heading. At the time the wool warehouse

was turned over to me by Quarles the keys were not given to me. I don't think I ever made any trips to the wool warehouse to let anyone in for anything, to take anything from the warehouse, except wool. Of course, I was there when the wool was all weighed. I did not have a key. After Quarles told me to take possession of the warehouse the Sheriff put on another lock and a new key, attached it and took charge of it. Possibly I had the keys. It was after Quarles left Salmon that the Sheriff took charge of the warehouse. My first entry was August 1, 1922. I take it G. B. Quarles left just before that. He was in possession up to that time and I did business with him."

On cross-examination by counsel for defendant the witness W. C. Smith testified:

"Prior to August 1, 1922, I did my business direct with Mr. Quarles. After August 1, 1922, Mr. Quarles told me that Rose Loring Quarles was the owner of the property and I assumed to act for Rose Loring Quarles. I did my business with G. B. Quarles, Rose Loring Quarles was his wife."

The witness J. Z. MOORE, being duly sworn, testified on direct examination by counsel for plaintiffs:

"I am railroad agent for the Gilmore & Pittsburgh Railroad at Salmon, Idaho. I am acquainted with G. B. Quarles and John Vernon Quarles. I was acquainted with G. B. Quarles during the year 1922 from January 1st to about October 12th. Some-

where along there. I am familiar with the building located on the Gilmore & Pittsburgh right-of-way about a thousand feet west of the depot in Salmon, which is commonly known as the wool warehouse. I don't know whether G. B. Quarles was operating the wool warehouse in 1922. I don't know who was operating it. He was around there acting as guardian. During the year he left there he was there during the wool shipping period up to the time he left, more or less. He loaded a car there somewhere along that period. I think it was consigned to his wife. She was the shipper. I remember H. G. King. I don't know anything about his being in possession of the wool warehouse. I know Thomas J. Stroud. I don't know whether the wool warehouse was in his possession during the year 1922. I know J. L. Kirtley. I don't know whether he was in possession of the warehouse in 1922."

On cross-examination by counsel for defendant the witness J. Z. Moore testified:

"When we had anything in the wool warehouse to ship out G. B. Quarles was apparently the guardian or whatever his capacity was. I do not know who was in actual possession of the wool warehouse during that time. I don't know anything about whether Mr. Quarles put wool in the warehouse and took it out with the consent of some other party. Mr. Stroud, the Sheriff, and Mr. Kirtley, the Deputy Sheriff, could have been in possession of the wool

warehouse in 1922. All I paid attention to was the man who handled the business.”

Pursuant to notice duly given and stipulation of the parties duly extending the time for taking such depositions, the deposition of LOUIS F. RAMEY, and the further depositions of H. G. KING and W. C. SMITH, witnesses on behalf of plaintiffs, were duly taken on the 26th day of September, 1927, at Salmon City, Idaho, before L. E. Glennon, a Notary Public in and for the State of Idaho:

The witness LOUIS F. RAMEY, being duly sworn, testified on direct examination by counsel for plaintiffs:

“I have lived practically 30 years in Lemhi County. I was here in the year 1922. I was engaged in ranching and livestock business that year. I think I sold G. B. Quarles some wool that year, that is through him. I did my business with Mr. Quarles at the wool warehouse on the Gilmore & Pittsburgh Railroad right-of-way. I think it was the latter part of June or the forepart of July. This was wool that was shorn from sheep which I owned. I handled the wool for Tom Kane at the same time I delivered my own. This wool was delivered to Mr. Quarles at the wool warehouse. He was receiving wool for shipment. I am very positive that I did not see Mr. H. G. King at the warehouse at the time I delivered the wool. I had no business with Mr. King that year in connection with the use

of the warehouse. G. B. Quarles appeared to be in charge of the warehouse when I was around there during the year 1922, the latter part of June or the forepart of July."

On cross-examination by counsel for defendant the witness Louis F. Ramey testified:

"I was at the warehouse once with the wool. I don't think I was at the warehouse except when I delivered the wool there and turned it over to Mr. Quarles. At that time Mr. King was not there. Further than that I don't know whether Mr. King was at the warehouse or not. I know nothing of it."

On re-direct examination by counsel for plaintiffs the witness Louis F. Ramey testified:

"I didn't get my money until the wool was loaded. I don't know just where it was I got the money. I got the money from G. B. Quarles."

On re-cross-examination by counsel for defendant, witness Louis F. Ramey testified:

"Mr. Quarles paid me by check but whether it was his personal check or check on firm who handled the wool I couldn't say. He didn't pay me off at the warehouse."

The witness H. G. KING, being duly sworn, testified on direct examination by counsel for plaintiffs:

"I have already testified by giving my deposition

in this case sometime ago. Since that time there has come to my attention some checks that I recognize as having been in my possession before. I signed on the back of this check. This is a check from Lemhi County Wools by G. B. Quarles, dated May 18, 1922, it is payable to the order of M. J. King for the sum of Two Hundred Dollars. This is another check similar to the first except the sum is \$69.25 and the date is May 20th, payable to M. J. King. I endorsed my name on the back as was the custom in matters of that kind. These checks were given for a little bunch of wool that belonged to Richards Brothers on which Mrs. King held a mortgage, and was sold to Mr. Quarles. Mr. Quarles bought the wool or handled the wool, whether he was agent for some company I am sure I forget. Mr. Quarles paid me for the wool and if I remember rightly he rendered me a statement that the check for \$200.00 was given in part payment and the \$69.25 in full payment. That was the wool that belonged to D. C. Richards. This would be the 1922 clip. It might have been left-over wool from 1921. I think it was 1922. Mrs. King could remember better than I. The wool was shipped down from Lemhi here and it was stored and then kept here until a full car was made. It was placed in the wool warehouse. I don't know by whom it was stored. It was sold to Mr. Quarles. I did not have anything to do with storing it or loading it out of the warehouse. I do know that the wool was shipped down

from Lemhi because there wasn't a carload of it and Mr. Quarles wanted it shipped down here so as to fill out and make up a car."

(The two checks above mentioned were then marked for identification as plaintiffs' Exhibits "H" and "I", to be attached to the deposition, and the examination was continued.)

"During the summer of 1922 from the time I was appointed by the Sheriff as custodian of the warehouse I did not to my knowledge take in any wool or store any wool or any other articles in the warehouse during that period after my appointment as custodian. I did not take any rent for the use of the warehouse during that period. I did not load anything out of the warehouse during that period. When I stated in my former deposition that I went by the warehouse substantially every day I meant that I had to go by the warehouse approximately three times a day driving back and forth up home. I traveled in my car sometimes and sometimes I walked. I took Main street in going home. The warehouse is situated about two blocks on the left hand side of Main street on the north side of Main street. Full two blocks between the railroad and Main street. The warehouse is on this side of the right-of-way. And that is what I meant in saying that I went by the warehouse every day. That is the road I took before and since that year in going from the city to my home. There was no change in going by the warehouse during the year I was cus-

todian, just the same as I always traveled. I referred in my former deposition to Mr. Rodgers. He was Mr. Boomer's head man here that looked after his books, records and supplies. In other words you would say that Mr. Rodgers was Mr. Boomer's right hand man here. Mr. Boomer was a contractor for road building in this County. He built the Challis road and up the Lemhi at the Indian reservation. The Salmon-Challis road which I refer to is the one from the City of Salmon towards Challis. During the time they were building that road they were using part of the warehouse. The part that Mr. Rodgers had rented took up a space approximately, I would say, about one-fifth of the warehouse in the southwest corner. This was partitioned off and he carried a great many supplies there of different descriptions. I was keeping books for the Shenon Land Company and Mr. Boomer was president of the Company. I remember going over to the warehouse for Mr. Rodgers on one or more occasions. I can't say how many times I went over there with him. I remember at least once. I have no particular way or means of fixing the exact time. It might have been before I was custodian, or while I was custodian. I kept no record during my custodianship with any business of the warehouse. I took in no rentals or storage charges and received no compensation as custodian up to the present time. I cannot remember of any other occasion while I was custodian of going to the warehouse except that I

might have gone with Mr. Rodgers once. When I was appointed custodian Mr. Kirtley came to me and it was in the bank when he first approached me to the best of my memory, he asked me if I would act as custodian as it was necessary to have a custodian appointed and it wouldn't entail any hardships or duties and I then agreed to accept and a little later he made the appointment and notified me of it. I was not notified to deliver possession to the purchaser when the warehouse was sold in January or February, 1923. They didn't come to me and ask for any discharge or to deliver possession to the purchaser."

On cross-examination by counsel for defendant the witness H. G. King testified:

"The only thing I know about the checks, plaintiff's exhibits "H" and "I" is that they were given to M. J. King by G. B. Quarles in payment for Mr. Richards' wool. I don't know of my knowledge where it was delivered except it was shipped down from Lemhi to Mr. Quarles and then he looked after it and paid for it. The warehouse stands northerly from Main street about two blocks on the railroad right-of-way on the southerly side of the railroad track. There are no buildings or any trees or other obstructions to the view between the warehouse and Main street where I passed it. One way the warehouse would be visible for five blocks in coming down from my house. This way I could see it for

five blocks and then I couldn't see it any more after I got opposite it for more than half a block. I guess there would be two blocks between the warehouse and Main street where there are no buildings. I am familiar with the tract of land owned by Mr. Glennon known as the Parkway Addition on the north side of Main street. It would depend entirely upon what you consider the length of a block as to whether this addition is three blocks long lengthwise along Main street. In Salt Lake City a block is six hundred feet and some places three hundred feet. I could not answer as to whether it is two blocks from Main street back to the warehouse. I could approximate the distance between the warehouse and Main street. I would judge from Main street directly across to the warehouse to be about 800 feet. In order for Mr. Boomer to get in to the corner used by him it was necessary to go through one of the two outside doors of the building. Not to my knowledge did the Shenon Land Company have anything to do with the Boomer contracts for the highway. The Shenon Land Company is a corporation. During the time when Mr. Boomer was here in road construction work I was bookkeeper for the Shenon Land Company. I did not make any entries in the Shenon Land Company's books with reference to expenditures or income from highway contracts. The Shenon Land Company had nothing to do with the highway contracts."

On re-direct examination by counsel for plaintiffs warehouse as I have testified.”

“When I stated before that during the time I was acting as custodian of the warehouse I did not find Mr. Quarles in charge of the warehouse in the summer of 1922 I was basing that on my going to the warehouse as I has testified.”

The witness W. C. SMITH, being duly sworn, on direct examination by counsel for plaintiffs testified:

“I testified on a former occasion in this case. I think that Mr. and Mrs. Quarles left Salmon sometime in October. I cannot fix the exact date. With reference to that time it was just a day or two before that Mr. Quarles requested me to act as agent in charge of the warehouse for Mrs. Quarles. I had the warehouse in my charge until the 1st of the year. The Sheriff put another lock on it and took charge of it for the Citizens Bank and the key which Mr. Quarles had given to me didn't fit. During the time I was immediately in charge I stored and took out goods. I handled it on a commission basis. Later I gave my check to Mrs. Quarles for her share of the storage I had taken in. Mr. Edwards did not have anything to do with the warehouse while Mr. Quarles had anything to do with it. I did business with Mr. Quarles from the middle of April, 1922, until Mr. Quarles turned the warehouse over to me

in October, with reference to storing and loading wool out of the warehouse.”

On cross-examination by counsel for defendant the witness W. C. Smith testified:

“I couldn’t tell the exact date when the warehouse was attached. I can’t remember exactly when the execution was levied on the warehouse by the Citizens Bank. I testified before that I didn’t know the exact date. I think it was along the 1st of the year, but I can’t remember. I am guessing at the date. I don’t know how I can remember the exact date. I am very positive that Mr. Edwards wasn’t in charge of the warehouse and I know and am so positive because Mr. Quarles was in charge of the Bank and in charge of the warehouse. I think I recall when Mr. Edwards became president of the Citizens Bank, it was in January, 1922. It was after that the attachment was levied on the warehouse. I told you it was hard for me to remember the year but after Mr. Quarles left there they attached it. After that there was wool in there. Mr. Quarles had wool in there. I tell you I don’t think I will testify but I will get my records. I don’t want to get mixed up. I can’t remember the time now when the attachment was levied on the warehouse by the Citizens National Bank, from the record I know, that is all. I think my testimony was tied to the execution. The execution was levied about January, 1923. It was about October, 1922, I claimed

to have gone in charge of the warehouse. Prior to that time or just before that time Mr. Quarles was in charge of the warehouse. As near as I can remember his custody began from the time he built the warehouse up to that time, October 1, 1922. I don't think that the Citizens National Bank ever went into custody or charge of the wool warehouse during the year 1922 and I don't think Mr. E. E. Edwards did. I was at the warehouse during June and July, 1922, loading wool. Mr. Quarles talked to me about taking over the warehouse in October. Rose Loring Quarles never talked to me about it. I went into possession as a result of a conversation with G. B. Quarles. He said she was the owner of the warehouse. I made payment of a portion of the transfer fees by check payable to Rose Loring Quarles. I gave the check to G. B. Quarles. The check has never been returned to me. I don't know who endorsed it for payment. After the levy of the execution in 1923 I didn't have anything to do with the warehouse until the 1st of March, 1927. I didn't have charge of it. I was in there every summer loading wool out of it. I have charge of it now."

G. B. Quarles, being called as a witness for plaintiff on the trial of the cause on October 26, 1927, testified as follows:

"I am the G. B. Quarles who heretofore gave a deposition in this case. I lived at Salmon City during the year 1922 until about the middle of October

that year. During that period I was in charge of the wool warehouse involved in this case. I had the keys and conducted the warehouse business the same as I had always done. I had no other business since about January that year. There was in the wool warehouse in 1922 a lot of the 1921 wool clip which had not been sold in 1921. It was the poorer grade of wool. I represented the owners of that wool in selling it. I found a buyer at what I thought was a satisfactory price and then corresponded with the owners and got authority to sell it. Much of that wool was mortgaged to the Citizens National Bank. I kept a book of the wool stored, received and shipped out by me in the wool warehouse during the year 1922. Book marked Plaintiffs' Exhibit No. J is the book which I refer to. (Whereupon plaintiff's Exhibit No. J was admitted in evidence.) It contains the names of those who stored wool with me in this warehouse and shows the amount of wool stored and where I sold the wool it shows what I received for it. On page 2 of this book it shows that J. O. Grubb stored 2 bags. They were marked J. They contained 325 pounds, which were sold at 21c per pound. In most cases it shows the date that the wool was received. On page 37 it shows that Charles Carlson brought in 27 bags; they weighed 8081 pounds and were unloaded on July 2, 1922. On page 43 it shows that L. Ramey, that is Louis F. Ramey, who gave a deposition in this case, stored 3 bags weighing 948 pounds. The

date is not given. On page 41 it shows that Steve Mahaffey stored 54 bags branded X, gross weight 16556 pounds. This was unloaded at the warehouse on July 8, 1922. On the same day Mrs. Jim Mahaffey stored 29 bags, gross weight 9394 pounds (p. 52). On page 55 it shows that H. G. Anderson stored 7 bags on July 10, 1922, and that this pool was mortgaged to the Citizens National Bank. On pages 115 to 119, inc., is a list giving the names of the persons or parties who paid me commission for storage on wool commencing on March 4th and ending on September 3, 1922. The list contains the names of about 142 parties who paid various sums from a few cents to over \$80 each, making a total of \$1,017.86 received by me as revenue from the wool warehouse during the period from March 4th to September 3, 1922. The book (Plaintiffs' Exh. No. J) shows the amount of wool stored by each of these parties and in most cases the date when the wool was stored.

"Plaintiffs' Exhibit No. L is a check issued by me on May 20, 1922, drawn on the Citizens National Bank of Salmon, the defendant in this case, and payable to the order of 'Yourselves' for \$2,291.79. It is signed "Lemhi Co. Wools by G. B. Quarles, Agt." It is stamped "The Citizens National Bank of Salmon, Idaho, paid May 20, 1922." That money was paid to the Bank as mortgagee of 1921 wool stored in the wool warehouse which I sold in 1922 as heretofore stated for the growers. I either knew

that the Bank held a mortgage on the wool or the growers gave me orders to pay the money to the Bank. I loaded all of that wool out of the warehouse and handled the sale and shipment of it and where the growers had not given orders to pay it to the Bank or the Bank didn't have a mortgage, I sent my checks for the wool to the growers. The wool was sold in May, 1922.

"Plaintiffs' Exhibit No. K is my letter to the Bank transmitting the check referred to above. Exhibit No. K reads as follows:

" 'Salmon, Idaho, May 20th, 1922
Citizens National Bank,
Salmon, Idaho.
Gentlemen:

Herewith is a check on you and to your order for twenty-two hundred ninety-one & 79/100 dollars for the use and benefit of the following named parties with advice to them as to the receipt by you and application of the same.

Names	Amount
Jas. G. England	\$ 2.00
S. A. Ball	84.63
Wm. Olsmer	35.70
E. W. Dillon	23.73
W. L. Dowton	70.56
Curtis Moore	123.27
J. A. Robbins	12.00
Andrew A. Lish	10.00
James Mahaffey	502.95

S. Sims	29.19
C. F. Snyder	21.00
W. S. Barce	353.22
S. A. Mahaffey Jr. (on note)	434.50
A. R. Nichols	120.75
A. D. Cook	21.00
Fred Abbey	4.40
Bear & Martin	10.50
Ed. Mulvania	432.39
	<hr/>
	\$2,291.79

from wool sales.

Very sincerely,

G. B. Quarles'

"I had some correspondence with the Bank during May and June, 1922, about the sale of this wool and the accounts of the different growers for whose wool I made remittances to the Bank. Plaintiffs' Exhibit No. M are letters received by me from the Bank. They are signed by G. W. Davis as Cashier and are dated May 24, May 29, June 2, June 6 and June 13, 1922, respectively. They are written on the letterhead of the Citizens National Bank of Salmon. The letter of May 24, 1922, reads as follows:

“ ‘CITIZENS NATIONAL BANK OF SALMON
Salmon, Idaho, May 24, 1922

Mr. G. B. Quarles,
Salmon, Idaho.

Dear Sir:

We have some of our customers statements of their wool unsold last year and we wish to call your attention to Curtis Moore especially as your statement to him shows that he had 1532 pounds and this at 22c would be over 300 dollars. You gave us for him about \$123.00. Please explain this difference to us at once as Mr. Moore wants the difference. He also says he never received a statement of this last sale from you and we expect that you will furnish each customer or us with a statement of the pounds sold. You told the writer that you were going to send these direct.

D/D

Yours truly,

G. W. Davis, Cashier'

“I wrote the Bank again on June 7, 1922, with reference to the accounts of the growers and explaining items which the Bank had inquired about. Plaintiffs' Exhibit No. N is that letter. This reads as follows:

“ ‘Salmon, Idaho, June 7th, 1922.

Citizens National Bank,
Salmon, Idaho.

Gentlemen:

Kindly see my letter to you dated May 20th, 1922,

enclosing check for \$2,291.79, thereafter I enclosed you checks for Curtis Moore for \$190.26 and for W. L. Dowton for \$78.81. The wool of these several parties was figured at the weights at time of grading, July, 1921. Shipments were made in May, 1922, wool was weighed and paid for at the time of shipment, there was a shrinkage in the lot of wool including the wool of these above and others amounting to 753 pounds. There was therefore a shrinkage of $3\frac{1}{2}\%$ on each parties wool and the wool of the parties for whom I paid you was over figured that amount without shrinkage.

Parties Name	Amount paid	Original weight
Jas. G. England	\$ 2.00	10
S. A. Ball	84.63	413
Wm. Oltmer	35.70	176
E. W. Dillon	23.73	118
W. L. Dowton	149.37	754
Curtis Moore	313.63	1,532
J. A. Robbins	12.00	60
Andrews A. Lish	10.00	50
James Mahaffey	502.95	2,443
S. Sims	29.19	145
C. F. Snyder	21.00	105
W. S. Barce	353.22	1,719
S. A. Mahaffey, Jr.	434.50	2,118
A. R. Nichols	120.75	589
A. D. Cook	21.00	103
Fred Abbey	4.40	27

Bear & Martin	10.50	52
Ed Mulvania	432.39	2,108
	<hr/>	<hr/>
	\$2,560.86	12,532

Shrinkage on above wools was 438 pounds and there has been an over payment of \$96.36 which amount I ask that you kindly refund and deposit to the account of 'Lemhi County Wools, G. B. Quarles, Agent.' Kindly advise me you have done this that this account may not become overdrawn.

Yours very truly,

G. B. Quarles'

This shrinkage was not discovered until the error in the accounts of C. W. Moore and W. L. Dowton were found."

"Plaintiff's Exhibit H attached to the deposition of H. G. King is a check for \$200.00 dated May 19, 1922, payable to M. J. King, the wife of H. G. King. It was issued by me on the Citizens National Bank, which is signed like the other checks—Lemhi Co. Wools by G. B. Quarles, Agt. That was for 1921 wool which I sold in May, 1922, for the growers, and I had an order to pay the money to M. J. King. The other check attached to Mr. King's deposition is dated May 20. It is like the first one, payable to M. J. King, but is for \$69.25. It was also for 1921 wool which I sold in May, 1922, for the grower. Mrs. King either had a mortgage on this wool or had

some interest in it and I was ordered to pay it to her. I gave the checks to H. G. King, I believe at his office down town. He was never at the warehouse so far as I know during 1922.”

Plaintiffs' Exhibit J, being the book kept by Mr. G. B. Quarles showing the wool stored at the wool warehouse during 1922 and other exhibits of both plaintiffs and defendant not set out in full in this statement may be sent by the Clerk of this Court to the Clerk of the Circuit Court of Appeals for examination on appeal by the members of that Court and need not be printed as part of the record, but reference thereto may be made in the briefs and argument of counsel with the same force and effect as if printed as part of the record.

STIPULATION FOR SETTLEMENT OF STATEMENT OF EVIDENCE

It is hereby stipulated and agreed that the foregoing Statement of Evidence is true and correct and may be forthwith settled by the Court as provided by the Equity Rules.

Dated this 17th day of August, 1928.

RICHARDS & HAGA

Attorneys for Plaintiff and Appellants

JONES, POMEROY & JONES

E. H. CASTERLIN

Attorneys for Defendants and Appellees

ORDER SETTLING STATEMENT OF
EVIDENCE

The time for settling and certifying the proposed Statement of Evidence of the Appellants, lately filed herein, having been duly extended by stipulations of the parties and by orders of the Court to and including this date and all amendments proposed by the Appellees which should be allowed, having been embodied in said Statement of Evidence as the same now stands and the parties having stipulated in writing that the foregoing statement as the same now stands is the true and correct Statement of the Evidence in said cause.

IT IS THEREFORE ORDERED that the Statement of Evidence as the same now stands, amended as aforesaid, be and hereby is settled as the true Statement of Evidence in this cause upon all issues raised by the Assignments of Error and the same is hereby certified accordingly, by the undersigned, the Judge who presided at the trial of said cause, and,

IT IS FURTHER ORDERED that the said Statement of Evidence as settled and certified be filed by the Clerk of this Court and made a part of the record in said cause. Dated this 1st day of September, 1928.

CHARLES C. CAVANAH

District Judge

Endorsed: Filed Sept. 1, 1928.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

No. 628

MEMORANDUM DECISION

March 5, 1928

Richards & Haga, attorneys for Plaintiffs.

Jones, Pomeroy & Jones and E. H. Casterlin, attorneys for Defendant.

CAVANAHA, DISTRICT JUDGE:

The defendant, Citizens National Bank, on April 15, 1922, instituted an action in the state court against G. B. Quarles to recover on a promissory note for \$5,456.99, and about April 17, 1922, attached a wool warehouse, then owned and in the possession of Quarles, by having the sheriff serve upon him the necessary papers required by the statute. Thereafter Quarles appeared in the action and moved to discharge the warehouse from the lien of the attachment. The court denied the motion, and on Oct. 2, 1922, judgment by default was entered against him. Execution was issued on the judgment on January 15, 1923, and pursuant thereto the warehouse was, on January 22, 1923, sold to the bank, who immediately took possession and ever since has retained exclusive control thereof. The warehouse is situated upon the right of way of the Gilmore & Pittsburg Ry. Co., who, on May 1, 1923, leased to the bank the site upon which it is. On May 29, 1922, Quarles being indebted in the

sum of \$4,490.88 to the plaintiffs, who were then minors and his children by a former wife, executed to them his note. This indebtedness arose out of property which they inherited from their mother's separate property and which Quarles had possession of. McCaleb, a brother of Quarles' former wife, when the plaintiffs were over the age of fourteen years, petitioned the state court to appoint him guardian ad litem for the purpose of bringing suit on the note against Quarles, and stating therein that the reason for the suit was to secure judgment within sixty days of the date of the bank's attachment, so that the plaintiffs might share in the proceeds of the property attached. He was appointed such guardian, and suit was by him started. Quarles on the same day appeared by demurrer, which was overruled, and, refusing to plead further, judgment by default was entered. Desiring to give his children security for the payment of the judgment, he, on June 1, 1922, executed a chattel mortgage to McCaleb covering the warehouse and other property, which was, by McCaleb, foreclosed on Sept. 21, 1922, by affidavit and notice of sale (Sec's. 6380 and 6384 Comp. Stats. of Idaho), and the warehouse was, on Sept. 30, 1922, sold to Rose Loring Quarles, the step mother of plaintiffs, on her bid of \$25.00. Thereafter Rose Loring Quarles, and her husband, G. B. Quarles, made and delivered a bill of sale to John and Virginia Quarles of all their interest in the warehouse.

At the time the attachment was levied the sheriff appointed H. G. King as custodian of the warehouse and left with him the key thereto. It seems that the custodian went to the warehouse and opened the door on one occasion with Mr. Rogers, who was associated with Mr. Bloomer, and who had supplies stored there. The custodian would allow those who had property stored there to go in. He says that he kept it locked when he was not present, and passed by it about three times every day when going to and from his home. No one, when he was acting as custodian, disputed his control. Since the warehouse was sold, in January, 1923, under the execution the bank has been in possession and operated it in storing wool for its customers. No attempt since it went into possession has been made to ouster it until this suit was instituted on July 7, 1926. The court, in the judgment under which the bank acquired title, expressly preserved to it all rights secured by the attachment. In the chattel mortgage, under which plaintiffs claim to have acquired title by foreclosure it is stated: "Nor does this mortgage waive the right of the judgment creditor of the said Quarles to share in the proceeds of the sale of any attached property attached by the bank." When the mortgage was noticed for foreclosure, the sheriff says that he appointed Mr. Havermann as custodian, and that his duties were subject and subsequent to those of King's, the custodian under the attachment. There is testimony that Quarles also, until October,

1922, when he left for California, at times removed wool from the warehouse since the attachment, and when he left he appointed Mr. Smith as his agent to store and remove wool and other goods therefrom. Smith never talked to Rose Loring Quarles about what he was to do, as Quarles made all the arrangements with him. He says that the sheriff, in January, 1923, placed another lock on the building and ousted him.

This suit is brought by plaintiffs, who have reached the age of majority, to secure a decree giving them possession of the warehouse, establishing the validity of the foreclosure proceedings, securing an accounting of the income of the property, foreclosing their mortgage, if any irregularity in the former proceedings appear, and adjudging the attachment of the defendant on the property void, thereby destroying defendant's title thereto. The parties agree that the warehouse is personal property, and therefore the case must be considered and determined under the evidence and principles of law relating to the attachment, foreclosure of chattel mortgages and sale of personal property.

The defendant bank first urges that the action is barred by the statute of Limitations of the state, and calls attention to Section 6611, which declares that an action for the specific recovery of personal property must be brought within three years. This statute is set in motion when a right of action has accrued, and there are parties competent to sue and

be sued, and before its operation should be suspended in favor of infants such disability must exist at the time the cause of action accrues. Therefore it will be applicable here only should it be held that the guardian ad litem has authority under the laws of the state to foreclose the mortgage. It will be observed that authority is granted to a guardian ad litem by Sections 6639, 6640 and 7855 of the state statutes, after being appointed by the court to prosecute or defend an action in any matter in which a minor is interested. McCaleb, who was appointed guardian ad litem for the plaintiffs to bring suit on the note against Quarles, had authority in that suit to accept additional security by way of mortgage for the judgment obtained. The foreclosure of the mortgage given in the suit in which he was appointed guardian, and when and how it should be foreclosed and what the mortgaged property should be bid in for, were matters within his authority as such guardian. Applying then the principle just stated to the testimony of Rose Loring Quarles, that she purchased the property at the foreclosure sale with her own money, and not with any funds of the plaintiffs, and for the purpose of making them a gift, which she thereafter made by bill of sale in September, 1925, it would seem that her right of action against the defendant accrued on January 22, 1923, when the property was sold under the execution to the bank, unless she bid the property in for the sole purpose and understanding that she was taking title

thereto for the benefit of the infants and to secure for them whatever rights they might have had under the mortgage, and in such case the claim of title having remained in her name in trust for the minor children until they became of age, the statute of limitations would not commence to run against them until October 13, 1924, and July 26, 1925, when they reached their majority. But the defendant further strenuously urges that Rose Loring Quarles, under the evidence, was a trustee of an express trust within the meaning of Section 6636 of the Idaho Compiled Statutes, which authorizes a trustee of an express trust to bring an action without joining with him the person for whose benefit the action is prosecuted, and one with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust, and therefore the statute began to run against her as such trustee on January 22, 1923, and by reason thereof the minors are barred because of the failure of the trustee to sue for the recovery of the property within three years.

I find myself unable to adopt this contention and apply this statute to the facts as disclosed in this record, for the trust referred to in the statute must be "an express trust", that is, one created by express terms in a deed, will or other writing. *Jones v. Byrne*, 149 Fed. 457; *Ames v. Howes*, 13 Ida. 756, 93 Pac. 35. There was no contract made between Rose Loring Quarles and anyone concerning

the holding of the property for the benefit of the minors. All that she did was to bid in the property for them, and held it for their use and benefit.

Defendant further asserts that even though it should be held that the action is not barred by the statute of limitations, and that the plaintiff's mortgage was legally foreclosed, yet whatever lien they may have upon the property is subsequent and subject to the attachment lien of the defendant, as the attachment was levied prior to the time the mortgage was foreclosed and the property sold thereunder. This contention calls for a consideration of the record as to what steps were taken in the attachment and foreclosure proceedings. If the attachment proceedings were in accordance with the statute of the state, then it follows that the plaintiffs cannot recover, for the attachment was levied upon the warehouse on April 17, 1922, and the foreclosure sale was subsequent thereto, on Sept. 30, 1922.

Subdivision 5 of Section 6784, Idaho Compiled Statutes, which is involved here, provides that: "Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such creditors or other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the creditors or other personal property in his possession or under his control, be-

longing to the defendants, are attached in pursuance of such writ." This statute is clear as to how personal property not capable of manual delivery is to be attached, as it says that such property must be attached by leaving with the person owing such debt or having in his possession or under his control such property, or with his agent, a copy of the writ and a notice that the same is attached in pursuance of the writ. The warehouse is situated upon land of the railroad, and being personal property was not capable of manual delivery and comes within the statute. The law provides two ways in which personal property is to be attached. Where it is capable of manual delivery it is levied upon by taking it into custody. No great strictness of form in such case is essential as against the defendant in the attachment proceedings, but if the property is suffered to remain in the possession of the debtor, the levy, while good as against him, is not sufficient as against purchasers in good faith, nor does it operate to defeat subsequent liens. To be sufficient where property is capable of manual delivery the custody must be such that the officer assert his control and power over it. The warehouse in question not being capable of manual delivery would not come within this principle of law. But the manner of attaching it is governed by the expression in the statute that personal property, not capable of manual delivery, must be attached by leaving with the debtor, or with his agent having control of such property, a copy

of the writ and a notice that the property in his possession or under his control is attached in pursuance of the writ. Such property is as much liable to attachment as if it was in the possession of a third person, and a contrary construction would exempt it from attachment. It is universally held that heavy and unmanageable articles, and growing crops, which are personal property not capable of manual delivery, may be properly attached by the officer not taking them into custody if he complies with the provisions of the statute. The service of a copy of the writ and notice upon the debtor, or his agent in control of such property, that the property is attached meets the requirements of the statute. The requirements for attaching personal property not capable of manual delivery are similar to the requirements for attaching real property. *Rudolph v. Sanders*, 111 Cal. 233, 43 Pac. 619.

The record discloses that the sheriff complied with the requirements of the statute in levying upon the warehouse under the writ of attachment, as he served upon the debtor, Quarles, in the suit brought by the bank against him, a copy of the writ of attachment and notice that the property then in his possession was attached in pursuance of the writ, and filed the writ with the County Recorder of the county, which was notice to all that the attachment was issued, and then made his return which was filed in the proceeding, reciting that: "I further certify that I attached that certain building known as the wool

warehouse, located on the right of way of the Gilmore & Pittsburgh Railroad Company, south of the tracks of said Company and Westerly from the depot, in Salmon, Lemhi County, Idaho, the same being designated by plaintiff as personal property, levied upon as such and placed in the hands of H. G. King, as custodian." At the time he made the attachment he appointed Mr. King custodian, and gave him the key to the warehouse. King had occasion to go and open it for the purpose of allowing Mr. Rogers to remove some property stored there, and also kept in touch with it daily as he passed by it. Thereafter, when the sheriff, in September, appointed Mr. Havermann custodian in the foreclosure proceedings, he says it was subject to the attachment, and placed the bank in possession when it was sold under the writ of execution.

The suggestion is made that the sheriff abandoned the attachment. There appears in the record no affirmative act or conduct of his indicating that he or the bank had abandoned the attachment; on the contrary, the acts of both himself and the bank show that they were from the time of the levy until the property was sold under execution continuing the attachment. The law does not presume or favor abandonment of the attachment, and before an attachment will be deemed to have been abandoned there must be some affirmative act or conduct of the sheriff or creditor showing a discontinuance thereof. The mere fact that Quarles or others were at times

permitted by the sheriff to remove property stored in the warehouse after the attachment was levied is not regarded as an abandonment of the attachment; nor did it discharge it where the levy is made upon personal property not capable of manual delivery and not consumable in the use. 6 C. J. 312; 23 C. J. 471. All parties who were interested in or had anything to do with the property knew and realized that the bank had attached it.

The bill contains the allegation that on October 16, 1922, Quarles was adjudged a bankrupt in this court, and thereafter, on February 28, 1924, received his discharge in bankruptcy. As those proceedings were not started until more than four months after the attachment lien was created, the attachment was not discharged or affected thereby.

Having thus reached the conclusion that the guardian had legal power and authority to accept and foreclose the mortgage subject to the prior attachment lien of the defendant, it does not become important as to whether or not the bill contains two inconsistent causes of action. However that may be, the scope of plaintiffs' bill, wherein they pray that the title to the property be quieted in them, and in the event that is not done, for a decree foreclosing their mortgage, are not inconsistent prayers for relief, but merely a statement of prayer in alternative form. This relief is in accordance with the provisions of Equity Rule No. 25, Subdv. 5, which provides that the bill should contain "a statement of and

prayer for any special relief pending the suit or on final hearing which may be stated and sought in alternative forms." This rule has been construed and the same conclusion reached in *Boyd, et al., v. New York & H. R. R. Co., et al*, 220 Fed. 174; *Simpkins Fed. Practice*, p. 550. It seems therefore clear that the plaintiffs have the right to pray at the same time in their bill that the proceedings relating to the foreclosure of their mortgage be held legal, and in case that is not done that their mortgage may be foreclosed.

It having been concluded that the defendant's attachment was legally levied, and constituted a prior lien against the warehouse to plaintiffs' claim, a decree for the defendant will accordingly be entered.

Endorsed: Filed March 5, 1928.

W. D. McREYNOLDS, Clerk.

By M. FRANKLIN, Deputy.

(Title of Court and Cause)

DECREE OF DISMISSAL OF BILL

This cause having come on to be heard on the 27th day of October, 1927, upon pleadings and proofs, and Richards & Haga having been heard on the part of the plaintiffs, and E. H. Casterlin and Jones, Pomeroy & Jones on the part of the defendant, and due deliberation having been had,

IT IS ORDERED, A D J U D G E D AND DE-
CREED that the said Bill of Complaint herein be
and the same is hereby dismissed, with costs to the
defendant to be taxed, in the sum of \$54.55.

DATED, this 9th day of March, 1928.

CHARLES C. CAVANAH
United States District Judge

Endorsed: Filed March 9, 1928.

W. D. McREYNOLDS, Clerk.

By M. FRANKLIN, Deputy.

(Title of Court and Cause)

PETITION FOR APPEAL

The above named plaintiffs, John Vernon Quarles and Hope Virginia Finn, conceiving themselves aggrieved by the decree entered in the above entitled cause on the 9th day of March, 1928, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors, which is filed herewith, and your petitioners pray that this appeal may be allowed and that citation may issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree is based, duly authenticated, may be sent to the

United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 6th day of June, 1928.

RICHARDS & HAGA
Solicitors for Plaintiffs

ORDER ALLOWING APPEAL

AND NOW, to-wit: on the 8th day of June, 1928, IT IS ORDERED that the foregoing petition be granted and that an appeal be allowed as therein prayed, upon petitioners filing a bond for costs on appeal, as required by law, in the sum of \$200.00.

CHARLES C. CAVANAH
District Judge

Endorsed: Filed June 6, 1928.

W. D. McREYNOLDS, Clerk.
By VERNA THAYER, Deputy.

(Title of Court and Cause)

ASSIGNMENT OF ERRORS

AND NOW COME The plaintiffs, John Vernon Quarles and Hope Virginia Finn, and, having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree

made and entered in the above entitled cause on the 9th day of March, 1928, say that said decree and the decision made and filed in said cause on the 5th day of March, 1928, are erroneous and unjust to these plaintiffs, and particularly in this:

I. Because the Court erred in holding and deciding that the lien of defendant under its attachment was prior and superior to the lien of plaintiffs' mortgage.

II. Because the Court erred in holding and deciding that the warehouse involved in this action is personal property not capable of manual delivery.

III. Because the Court erred in holding and deciding that the provisions of subdivision 5 of Section 6784 of the Compiled Statutes of Idaho, 1919, apply to the attachment of the warehouse involved in this action.

IV. Because the Court erred in not holding and deciding that the warehouse involved in this action is personal property capable of manual delivery.

V. Because the Court erred in not holding and deciding that the provisions of subdivision 3 of Section 6784, Compiled Statutes of Idaho, 1919, apply to the attachment of the warehouse involved in this action.

VI. Because the Court erred in holding and deciding that the warehouse involved in this action

could be attached without taking the same into possession.

VII. Because the Court erred in holding and deciding that the pretended attachment of the warehouse involved in this action was valid and effectual for any purpose.

VIII. Because the Court erred in dismissing plaintiffs' bill of complaint herein.

WHEREFORE, the said plaintiffs pray that the decree entered herein be reversed and set aside with directions to the District Court to enter a decree decreeing plaintiffs to be the owners of said warehouse and determining the damages which they are entitled to recover.

RICHARDS & HAGA

Solicitors for Plaintiffs

Residence: Boise, Idaho

Endorsed: Filed June 6, 1928.

W. D. McREYNOLDS, Clerk.

By VERNA THAYER, Deputy.

(Title of Court and Cause)

ADDITIONAL ASSIGNMENT OR ERRORS

COME NOW the plaintiffs John Vernon Quarles and Hope Virginia Finn, and having on June 6,

1928, filed herein their petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered in the above entitled cause on the 9th day of March, 1928, and having with said petition filed certain Assignment of Errors, add thereto the following Assignment of Error to be numbered and to read as follows:

IX. Because the Court erred in holding and deciding that H. G. King had such custody and control of the warehouse involved in this action as is required by the statutes of the State of Idaho in order to constitute a legal and valid attachment of such property.

RICHARDS & HAGA

Solicitors for Plaintiffs

Residence: Boise, Idaho

Endorsed: Filed June 8, 1928.

W. D. McREYNOLDS, Clerk.

By VERNA THAYER, Deputy.

(Title of Court and Cause)

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS,
That we, John Vernon Quarles and Hope Virginia
Finn, as principals and AMERICAN SURETY

COMPANY OF NEW YORK, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to transact surety business in the State of Idaho, as surety, are held firmly bound unto The Citizens National Bank of Salmon, Idaho, a corporation, the above named defendant, in the penal sum of TWO HUNDRED and NO/100 (\$200.00) DOLLARS, to be paid to said The Citizens National Bank of Salmon, Idaho, a corporation, its successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

SEALED with our seals and dated this 9th day of June, 1928.

THE condition of this obligation is such, that whereas the above named John Vernon Quarles and Hope Virginia Finn, the above named plaintiffs, have prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the decree entered against them in this cause in the said United States District Court for the District of Idaho, Eastern Division, on the 9th day of March, 1928, all of which is more particularly set forth in the petition for appeal and the assignment of errors filed in said cause.

NOW, THEREFORE, the condition of this obligation is such that if the above named plaintiffs

John Vernon Quarles and Hope Virginia Finn, appellants on said appeal, shall prosecute their said appeal to effect and answer all damages and costs, if they fail to sustain their appeal, then the above obligation shall be void, otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF the said Principals have hereunto caused their names to be subscribed by their Solicitors of record and the said AMERICAN SURETY COMPANY OF NEW YORK has caused this undertaking to be executed as Surety.

Dated this 9th day of June, 1928.

JOHN VERNON QUARLES
HOPE VIRGINIA FINN

Principals

By Richards & Haga

Solicitors

AMERICAN SURETY COMPANY
OF NEW YORK

By A. J. Gamble

Its Attorney-in-Fact

Surety

(Seal)

Countersigned at

Boise, Idaho,

By O. O. Haga

The foregoing bond is hereby approved.

Dated this 11th day of June, 1928.

CHARLES C. CAVANAUGH
District Judge

Endorsed: Filed June 11, 1928.

W. D. McREYNOLDS, Clerk.
By M. FRANKLIN, Deputy.

(Title of Court and Cause)

CITATION

UNITED STATES OF AMERICA)
)ss.
DISTRICT OF IDAHO)

TO THE CITIZENS NATIONAL BANK OF
SALMON, IDAHO, a corporation, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Eastern Division, wherein John Vernon Quarles and Hope Virginia Finn, are appellants, and you are appellee, to show cause, if any there be, why the

decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

WITNESS, the Honorable CHARLES C. CAVANAUGH, United States District Judge for the District of Idaho, this 8th day of June A. D. 1928, and of the independence of the United States, the one hundred and fifty-second.

CHARLES C. CAVANAUGH

ATTEST:

District Judge

(Seal)

W. D. McREYNOLDS, Clerk.

Service of the foregoing citation and receipt of a copy thereof, is hereby admitted this 12th day of June, 1928.

T. D. JONES

JONES, POMEROY & JONES

Solicitors for The Citizens
National Bank of Salmon, Idaho,
a corporation, defendant and
appellee.

Endorsed: Filed June 12, 1928.

W. D. McREYNOLDS, Clerk.

By M. FRANKLIN, Deputy.

(Title of Court and Cause)

PRAECIPE

TO W. D. McREYNOLDS, CLERK OF THE
ABOVE ENTITLED COURT:

You will please prepare the record on appeal of the plaintiffs John Vernon Quarles and Hope Virginia Finn, who have taken an appeal in the above entitled cause from the decree of dismissal in said cause made and entered on the 9th day of March, 1928, such record to consist of the following:

1. Bill of complaint as amended.
2. Answer of defendant as amended.
3. Statement of evidence under Equity Rule No. 75 as hereafter settled and allowed by the Court.
4. Decision filed March 5, 1928.
5. Decree of dismissal made and entered March 9, 1928.
6. All papers filed in connection with this appeal, to-wit: Petition for appeal; assignment of errors; order allowing appeal; bond on appeal; citation, and this praecipe, together with your certificate.

In preparing the above record you will please omit the title of all pleadings, except the bill of complaint, inserting in lieu thereof "Title of Court and Cause" followed by the name of the pleading or instrument. You will please omit the verification of all pleadings, inserting in lieu thereof whenever the pleading is verified, the words "Duly Verified."

Dated this 12th day of June, 1928.

RICHARDS & HAGA

Solicitors for Plaintiffs and
Appellants John Vernon Quarles
and Hope Virginia Finn

STATE OF IDAHO)
)ss.
COUNTY OF ADA)

CHAS. H. DARLING, being first duly sworn, on oath, deposes and says: That he is a citizen of the United States and of the State of Idaho, over the age of 21 years; that on the 12th day of June, 1928, he deposited in an envelope in the Post Office at Boise, Idaho, securely sealed and with ordinary postage prepaid thereon one true and correct copy of the foregoing praecipe directed and addressed to Messrs. Jones, Pomeroy & Jones, the Solicitors for the defendant in the above entitled cause at Pocatello, Idaho; Pocatello, Idaho, is the residence and Post Office address of the said solicitors for the defendant and that there is regular communication by

United States Mail between the Post Office at Boise,
Idaho, and Pocatello, Idaho.

CHAS. H. DARLING

Subscribed and sworn to
before me this 12th day of
June, 1928.

H. M. JEFFREY
Notary Public for Idaho
Residence: Boise, Idaho

(SEAL)

Endorsed: Filed June 12, 1928.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

CLERK'S CERTIFICATE

I. W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 119, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$148.30, and that the same has been paid by the appellants.

Witness my hand and the seal of said Court this 31st day of October, 1928.

W. D. McREYNOLDS, Clerk

(SEAL)

